

## Preemption Analysis

The material in this assignment consist of a summary of preemption analysis followed by three recent preemption cases decided by the United States Supreme Court.

When Congress exercises a power granted to it in the Constitution, Congress can choose to have the federal law it enacts supersede state laws that regulate in the same area due to the operation of the Supremacy Clause of Article VI. The displacement of state law is called preemption. In a preemption challenge, the challenger is claiming that a state law is unconstitutional because it has been preempted by a valid federal law. Under this analysis, the state law violates the Supremacy Clause of Article VI because the federal government has enacted a law that prohibits the state from acting in a particular way and the state law being challenged is one in which the state is acting in the prohibited manner.

There are two different kinds of preemption arguments. The first is express preemption. When making such an argument, the challenger argues that the federal law contains language that expressly preempts state law. In such cases, a court must first decide if the language in the federal statute should be read to expressly preempt state law. Second, the court must decide how to interpret the scope of the preemption language. This issue arises because frequently Congress intends to partially, but not completely, preempt state law. Therefore, the court must decide which state laws fall within the scope of the intended preemption and which state laws fall outside the scope of the intended preemption.

The second kind of preemption argument is implied preemption. Implied preemption occurs in situations where Congress has not inserted express preemptive language in a federal law, but where it is possible to conclude, nonetheless, that Congress intended the federal statute to preempt certain types of state laws. The job of the courts in such cases is to discern the intent of Congress.

There are three different kinds of implied preemption arguments that can be asserted. The first contends that there is a conflict between state and federal law and the conflict makes it impossible to comply with both state and federal law at the same time. In such a situation, if a court agrees that compliance with both laws is impossible, it will conclude that Congress intended federal law to supersede state law and it will invalidate the state law as a violation of the Supremacy Clause.

A second type of conflict preemption asserts that a state law undermines the objectives of federal law. In this kind of case, even though if it is possible to comply with both state and federal law at the same time, a court will consider whether Congress intended to preclude state law from creating a particular obstacle to the accomplishment of the federal purpose. To decide whether this type of implied preemption exists, a court will examine the provisions of the federal law and its legislative history to determine what the purpose of the federal law is and whether the operation of the state law interferes with accomplishing the objectives of the federal law.

In addition to the two types of conflict preemption, there is one other type of implied preemption. This is called field preemption. This occurs where Congress has enacted a law and a court concludes that the federal law was intended to occupy the entire field of regulation, leaving

no room for state laws on the same subject even if those state laws are consistent with the objectives of the federal law. The more comprehensive the federal law is, the more likely Congress will be found to have such an intent. Field preemption is often difficult to discern. Therefore, the courts use several presumptions or default rules. In general, a court is less likely to find field preemption if the field Congress is regulating is one where the states have traditionally played an important role. This is because courts presume that Congress did not intend to oust the states from a traditional field of state regulation if Congress has not clearly expressed such an intent. By contrast, a court is more likely to find field preemption if the field Congress is regulating is one where the federal government has traditionally been dominant.

Multiple preemption arguments are often asserted in a case. A challenger may argue there is express preemption, but alternatively argue there is implied preemption. Similarly, several different forms of implied preemption can often be asserted in the same case.

**WYETH, PETITIONER v. DIANA LEVINE**  
129 Sup. Ct. 1187 (2009)

**JUDGES:** STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in the judgment. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA, J., joined.

**JUSTICE STEVENS** delivered the opinion of the Court.

Directly injecting the drug Phenergan into a patient’s vein creates a significant risk of catastrophic consequences. A Vermont jury found that petitioner Wyeth, the manufacturer of the drug, had failed to provide an adequate warning of that risk and awarded damages to respondent Diana Levine to compensate her for the amputation of her arm. The warnings on Phenergan’s label had been deemed sufficient by the federal Food and Drug Administration (FDA) when it approved Wyeth’s new drug application in 1955 and when it later approved changes in the drug’s labeling. The question we must decide is whether the FDA’s approvals provide Wyeth with a complete defense to Levine’s tort claims. We conclude that they do not.

I

Phenergan is Wyeth’s brand name for promethazine hydrochloride, an antihistamine used to treat nausea. The injectable form of Phenergan can be administered intramuscularly or intravenously, and it can be administered intravenously through either the “IV-push” method, whereby the drug is injected directly into a patient’s vein, or the “IV-drip” method, whereby the drug is introduced into a saline solution in a hanging intravenous bag and slowly descends through a catheter inserted in a patient’s vein. The drug is corrosive and causes irreversible gangrene if it enters a patient’s artery.

Levine's injury resulted from an IV-push injection of Phenergan. On April 7, 2000, as on previous visits to her local clinic for treatment of a migraine headache, she received an intramuscular injection of Demerol for her headache and Phenergan for her nausea. Because the combination did not provide relief, she returned later that day and received a second injection of both drugs. This time, the physician assistant administered the drugs by the IV-push method, and Phenergan entered Levine's artery, either because the needle penetrated an artery directly or because the drug escaped from the vein into surrounding tissue (a phenomenon called "perivascular extravasation") where it came in contact with arterial blood. As a result, Levine developed gangrene, and doctors amputated first her right hand and then her entire forearm. In addition to her pain and suffering, Levine incurred substantial medical expenses and the loss of her livelihood as a professional musician.

After settling claims against the health center and clinician, Levine brought an action for damages against Wyeth, relying on common-law negligence and strict-liability theories. Although Phenergan's labeling warned of the danger of gangrene and amputation following inadvertent intra-arterial injection, Levine alleged that the labeling was defective because it failed to instruct clinicians to use the IV-drip method of intravenous administration instead of the higher risk IV-push method. More broadly, she alleged that Phenergan is not reasonably safe for intravenous administration because the foreseeable risks of gangrene and loss of limb are great in relation to the drug's therapeutic benefits.

Wyeth filed a motion for summary judgment, arguing that Levine's failure-to-warn claims were pre-empted by federal law. The court found no merit in either Wyeth's field pre-emption argument, which it has since abandoned, or its conflict pre-emption argument. Answering questions on a special verdict form, the jury found that Wyeth was negligent, that Phenergan was a defective product as a result of inadequate warnings and instructions, and that no intervening cause had broken the causal connection between the product defects and the plaintiff's injury. It awarded total damages of \$7,400,000, which the court reduced to account for Levine's earlier settlement with the health center and clinician.

Wyeth makes two separate pre-emption arguments: first, that it would have been impossible for it to comply with the state-law duty to modify Phenergan's labeling without violating federal law, and second, that recognition of Levine's state tort action creates an unacceptable "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" because it substitutes a lay jury's decision about drug labeling for the expert judgment of the FDA. As a preface to our evaluation of these arguments, we identify two factual propositions decided during the trial court proceedings, emphasize two legal principles that guide our analysis, and review the history of the controlling federal statute.

The trial court proceedings established that Levine's injury would not have occurred if Phenergan's label had included an adequate warning about the risks of the IV-push method of administering the drug. In finding Wyeth negligent as well as strictly liable, the jury also determined that Levine's injury was foreseeable. That the inadequate label was both a but-for and proximate cause of Levine's injury is supported by the record and no longer challenged by Wyeth.

The trial court proceedings further established that the critical defect in Phenergan's label was the lack of an adequate warning about the risks of IV-push administration. Levine also offered evidence that the IV-push method should be contraindicated and that Phenergan should never be administered intravenously, even by the IV-drip method. The jury verdict established only that Phenergan's warning was insufficient. It did not mandate a particular replacement warning, nor did it require contraindicating IV-push administration: "There may have been any number of ways for [Wyeth] to strengthen the Phenergan warning without completely eliminating IV-push administration." We therefore need not decide whether a state rule proscribing intravenous administration would be pre-empted. The narrower question presented is whether federal law pre-empts Levine's claim that Phenergan's label did not contain an adequate warning about using the IV-push method of administration.

Our answer to that question must be guided by two cornerstones of our pre-emption jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"

Wyeth first argues that Levine's state-law claims are pre-empted because it is impossible for it to comply with both the state-law duties underlying those claims and its federal labeling duties. The FDA's premarket approval of a new drug application includes the approval of the exact text in the proposed label. Generally speaking, a manufacturer may only change a drug label after the FDA approves a supplemental application. There is, however, an FDA regulation that permits a manufacturer to make certain changes to its label before receiving the agency's approval. Among other things, this "changes being effected" (CBE) regulation provides that if a manufacturer is changing a label to "add or strengthen a contraindication, warning, precaution, or adverse reaction" or to "add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product," it may make the labeling change upon filing its supplemental application with the FDA; it need not wait for FDA approval.

Wyeth argues that the CBE regulation is not implicated in this case because a 2008 amendment provides that a manufacturer may only change its label "to reflect newly acquired information." Resting on this language, Wyeth contends that it could have changed Phenergan's label only in response to new information that the FDA had not considered. And it maintains that Levine has not pointed to any such information concerning the risks of IV-push administration. Thus, Wyeth insists, it was impossible for it to discharge its state-law obligation to provide a stronger warning about IV-push administration without violating federal law. Wyeth's argument misapprehends both the federal drug regulatory scheme and its burden in establishing a pre-emption defense.

We need not decide whether the 2008 CBE regulation is consistent with the FDCA and the previous version of the regulation because Wyeth could have revised Phenergan's label even in accordance with the amended regulation. As the FDA explained in its notice of the final rule, "newly acquired information" is not limited to new data, but also encompasses "new analyses of

previously submitted data." The rule accounts for the fact that risk information accumulates over time and that the same data may take on a different meaning in light of subsequent developments.

The record is limited concerning what newly acquired information Wyeth had or should have had about the risks of IV-push administration of Phenergan because Wyeth did not argue before the trial court that such information was required for a CBE labeling change. Levine did, however, present evidence of at least 20 incidents prior to her injury in which a Phenergan injection resulted in gangrene and an amputation. After the first such incident came to Wyeth's attention in 1967, it notified the FDA and worked with the agency to change Phenergan's label. In later years, as amputations continued to occur, Wyeth could have analyzed the accumulating data and added a stronger warning about IV-push administration of the drug.

Wyeth argues that if it had unilaterally added such a warning, it would have violated federal law governing unauthorized distribution and misbranding. Its argument that a change in Phenergan's labeling would have subjected it to liability for unauthorized distribution rests on the assumption that this labeling change would have rendered Phenergan a new drug lacking an effective application. But strengthening the warning about IV-push administration would not have made Phenergan a new drug. Nor would this warning have rendered Phenergan misbranded.

Wyeth's cramped reading of the CBE regulation and its broad reading of the FDCA's misbranding and unauthorized distribution provisions are premised on a more fundamental misunderstanding. Wyeth suggests that the FDA, rather than the manufacturer, bears primary responsibility for drug labeling. Yet through many amendments to the FDCA and to FDA regulations, it has remained a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times. It is charged both with crafting an adequate label and with ensuring that its warnings remain adequate.

Indeed, prior to 2007, the FDA lacked the authority to order manufacturers to revise their labels. When Congress granted the FDA this authority, it reaffirmed the manufacturer's ultimate responsibility for its label. Thus, when the risk of gangrene from IV-push injection of Phenergan became apparent, Wyeth had a duty to provide a warning that adequately described that risk, and the CBE regulation permitted it to provide such a warning before receiving the FDA's approval.

Of course, the FDA retains authority to reject labeling changes made pursuant to the CBE regulation in its review of the manufacturer's supplemental application, just as it retains such authority in reviewing all supplemental applications. But absent clear evidence that the FDA would not have approved a change to Phenergan's label, we will not conclude that it was impossible for Wyeth to comply with both federal and state requirements. Wyeth has offered no such evidence. We accordingly cannot credit Wyeth's contention that the FDA would have prevented it from adding a stronger warning about the IV-push method of intravenous administration.

Impossibility pre-emption is a demanding defense. On the record before us, Wyeth has failed to demonstrate that it was impossible for it to comply with both federal and state requirements. The CBE regulation permitted Wyeth to unilaterally strengthen its warning, and the mere fact that the FDA approved Phenergan's label does not establish that it would have prohibited such a change.

Wyeth also argues that requiring it to comply with a state-law duty to provide a stronger warning about IV-push administration would obstruct the purposes and objectives of federal drug labeling regulation. Levine's tort claims, it maintains, are pre-empted because they interfere with "Congress's purpose to entrust an expert agency to make drug labeling decisions that strike a balance between competing objectives." We find no merit in this argument, which relies on an untenable interpretation of congressional intent and an overbroad view of an agency's power to pre-empt state law.

Wyeth contends that the FDCA establishes both a floor and a ceiling for drug regulation: Once the FDA has approved a drug's label, a state-law verdict may not deem the label inadequate, regardless of whether there is any evidence that the FDA has considered the stronger warning at issue. The most glaring problem with this argument is that all evidence of Congress' purposes is to the contrary. Building on its 1906 Act, Congress enacted the FDCA to bolster consumer protection against harmful products.

If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history. But despite its 1976 enactment of an express pre-emption provision for medical devices, Congress has not enacted such a provision for prescription drugs. Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.

In short, Wyeth has not persuaded us that failure-to-warn claims like Levine's obstruct the federal regulation of drug labeling. Although we recognize that some state-law claims might well frustrate the achievement of congressional objectives, this is not such a case.

We conclude that it is not impossible for Wyeth to comply with its state and federal law obligations and that Levine's common-law claims do not stand as an obstacle to the accomplishment of Congress' purposes in the FDCA.

**JUSTICE THOMAS**, concurring in the judgment.

I agree with the Court that the fact that the Food and Drug Administration (FDA) approved the label for petitioner Wyeth's drug Phenergan does not pre-empt the state-law judgment before the Court. I write separately, however, because I cannot join the majority's implicit endorsement of far-reaching implied pre-emption doctrines. In particular, I have become increasingly skeptical of this Court's "purposes and objectives" pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law. Because implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution, I concur only in the judgment.

**Justice Alito**, with whom **The Chief Justice** and **Justice Scalia** join, dissenting.

This case illustrates that tragic facts make bad law. The Court holds that a state tort jury, rather than the Food and Drug Administration (FDA), is ultimately responsible for regulating

warning labels for prescription drugs. That result cannot be reconciled with general principles of conflict pre-emption. I respectfully dissent.

The Court frames the question presented as a “narro[w]” one—namely, whether Wyeth has a duty to provide “an adequate warning about using the IV-push method” to administer Phenergan. The question presented by this case is not a “narrow” one, and it does not concern whether Phenergan’s label should bear a “stronger” warning. Rather, the real issue is whether a state tort jury can countermand the FDA’s considered judgment that Phenergan’s FDA-mandated warning label renders its intravenous (IV) use “safe.”

The FDA has long known about the risks associated with IV push in general and its use to administer Phenergan in particular. Whether wisely or not, the FDA has concluded—over the course of extensive, 54-year-long regulatory proceedings—that the drug is “safe” and “effective” when used in accordance with its FDA-mandated labeling.

To the extent that “[t]he purpose of Congress is the ultimate touchstone in every pre-emption case,” Congress made its “purpose” plain in authorizing the FDA—not state tort juries—to determine when and under what circumstances a drug is “safe.” Where the FDA determines, in accordance with its statutory mandate, that a drug is on balance “safe,” our conflict pre-emption cases prohibit any State from countermanding that determination. A faithful application of this Court’s conflict pre-emption cases compels the conclusion that the FDA’s 40-year-long effort to regulate the safety and efficacy of Phenergan pre-empts respondent’s tort suit.

To be sure, state tort suits can peacefully coexist with the FDA’s labeling regime, and they have done so for decades. But this case is far from peaceful coexistence. The FDA told Wyeth that Phenergan’s label renders its use “safe.” But the State of Vermont, through its tort law, said: “Not so.” The state-law rule at issue here is squarely pre-empted.

**Chamber of Commerce of the United States of America v. Whiting**  
131 Sup. Ct. 1968 (2011)

**Chief Justice Roberts** delivered the opinion of the Court, except as to Parts II-B and III-B.

Federal immigration law expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ ... unauthorized aliens." A recently enacted Arizona statute--the Legal Arizona Workers Act--provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked. The law also requires that all Arizona employers use a federal electronic verification system to confirm that the workers they employ are legally authorized workers. The question presented is whether federal immigration law preempts those provisions of Arizona law. Because we conclude that the State's licensing provisions fall squarely within the federal statute's savings clause and that the Arizona regulation does not otherwise conflict with federal law, we hold that the Arizona law is not preempted.

## I

In 1952, Congress enacted the Immigration and Nationality Act (INA). That statute established a "comprehensive federal statutory scheme for regulation of immigration and naturalization" and set "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."

[In 1986,] Congress enacted the Immigration Reform and Control Act (IRCA). IRCA makes it "unlawful for a person or other entity ... to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." IRCA defines an "unauthorized alien" as an alien who is not "lawfully admitted for permanent residence" or not otherwise authorized by the Attorney General to be employed in the United States. To facilitate compliance with this prohibition, IRCA requires that employers review documents establishing an employee's eligibility for employment. An employer can confirm an employee's authorization to work by reviewing the employee's United States passport, resident alien card, alien registration card, or other document approved by the Attorney General; or by reviewing a combination of other documents such as a driver's license and social security card. The employer must attest under penalty of perjury on Department of Homeland Security Form I-9 that he "has verified that the individual is not an unauthorized alien" by reviewing these documents.

Employers that violate IRCA's strictures may be subjected to both civil and criminal sanctions. Immigration and Customs Enforcement, an entity within the Department of Homeland Security, is authorized to bring charges against a noncompliant employer.

IRCA also restricts the ability of States to combat employment of unauthorized workers. The Act expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." Under that provision, state laws imposing civil fines for the employment of unauthorized workers are now expressly preempted.

In 1996, in an attempt to improve IRCA's employment verification system, Congress created three experimental complements to the I-9 process as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Only one of those programs--E-Verify--remains in operation today. Originally known as the "Basic Pilot Program," E-Verify "is an internet-based system that allows an employer to verify an employee's work-authorization status."

Acting against this statutory and historical background, several States have recently enacted laws attempting to impose sanctions for the employment of unauthorized aliens through, among other things, "licensing and similar laws." Arizona is one of them. The Legal Arizona Workers Act of 2007 allows Arizona courts to suspend or revoke the licenses necessary to do business in the State if an employer knowingly or intentionally employs an unauthorized alien. The Arizona law also requires that "every employer, after hiring an employee, shall verify the employment eligibility of the employee" by using E-Verify.

## I

The Chamber of Commerce argues that Arizona's law is expressly preempted by IRCA's text and impliedly preempted because it conflicts with federal law. We address each of the Chamber's



arguments in turn.

When a federal law contains an express preemption clause, we "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." IRCA expressly preempts States from imposing "civil or criminal sanctions" on those who employ unauthorized aliens, "other than through licensing and similar laws." The Arizona law, on its face, purports to impose sanctions through licensing laws. The state law authorizes state courts to suspend or revoke an employer's business licenses if that employer knowingly or intentionally employs an unauthorized alien. The Arizona law defines "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" the State. That definition largely parrots the definition of "license" that Congress codified in the Administrative Procedure Act.

Apart from that general definition, the Arizona law specifically includes within its definition of "license" documents such as articles of incorporation, certificates of partnership, and grants of authority to foreign companies to transact business in the State.

A license is "a right or permission granted in accordance with law ... to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful." Webster's Third New International Dictionary 1304 (2002). Articles of incorporation and certificates of partnership allow the formation of legal entities and permit them as such to engage in business and transactions "which but for such" authorization "would be unlawful." Moreover, even if a law regulating articles of incorporation, partnership certificates, and the like is not itself a "licensing law," it is at the very least "similar" to a licensing law, and therefore comfortably within the savings clause.

The Chamber and the United States as amicus argue that the Arizona law is not a "licensing" law because it operates only to suspend and revoke licenses rather than to grant them. Again, this construction of the term runs contrary to the definition that Congress itself has codified. It is also contrary to common sense. There is no basis in law, fact, or logic for deeming a law that grants licenses a licensing law, but a law that suspends or revokes those very licenses something else altogether.

IRCA expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others. We hold that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted.

As an alternative to its express preemption argument, the Chamber contends that Arizona's law is impliedly preempted because it conflicts with federal law. At its broadest level, the Chamber's argument is that Congress "intended the federal system to be exclusive," and that any state system therefore necessarily conflicts with federal law. But Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.

Not only that, the Arizona law expressly provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, and "shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States." What is more, a state court "shall consider only the federal government's determination" when deciding "whether an employee is an unauthorized alien." As a result, there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage.

Of course Arizona hopes that its law will result in more effective enforcement of the prohibition on employing unauthorized aliens. But in preserving to the States the authority to impose sanctions through licensing laws, Congress did not intend to preserve only those state laws that would have no effect. The balancing process that culminated in IRCA resulted in a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban.

Implied preemption analysis does not justify a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives"; such an endeavor "would undercut the principle that it is Congress rather than the courts that preempts state law." Our precedents "establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." That threshold is not met here.

### III

The Chamber also argues that Arizona's requirement that employers use the federal E-Verify system to determine whether an employee is authorized to work is impliedly preempted. In the Chamber's view, "Congress wanted to develop a reliable and non-burdensome system of work-authorization verification" that could serve as an alternative to the I-9 procedures, and the "mandatory use of E-Verify impedes that purpose."

We begin again with the relevant text. The provision of IIRIRA setting up the program that includes E-Verify contains no language circumscribing state action. It does, however, constrain federal action: absent a prior violation of federal law, "the Secretary of Homeland Security may not require any person or other entity [outside of the Federal Government] to participate in a pilot program" such as E-Verify. That provision limits what the Secretary of Homeland Security may do--nothing more.

Arizona's use of E-Verify does not conflict with the federal scheme. The Arizona law requires that "every employer, after hiring an employee, shall verify the employment eligibility of the employee" through E-Verify. That requirement is entirely consistent with the federal law. And the consequences of not using E-Verify under the Arizona law are the same as the consequences of not using the system under federal law. In both instances, the only result is that the employer forfeits the otherwise available rebuttable presumption that it complied with the law.

IRCA expressly reserves to the States the authority to impose sanctions on employers hiring unauthorized workers, through licensing and similar laws. In exercising that authority, Arizona has taken the route least likely to cause tension with federal law. It uses the Federal Government's own definition of "unauthorized alien," it relies solely on the Federal

Government's own determination of who is an unauthorized alien, and it requires Arizona employers to use the Federal Government's own system for checking employee status. If even this gives rise to impermissible conflicts with federal law, then there really is no way for the State to implement licensing sanctions, contrary to the express terms of the savings clause.

**Justice Kagan** took no part in the consideration or decision of this case.

**Justice Breyer**, with whom **Justice Ginsburg** joins, dissenting.

The federal Immigration Reform and Control Act of 1986 (Act or IRCA) preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens." The state law before us imposes civil sanctions upon those who employ unauthorized aliens. Thus the state law falls within the federal Act's general preemption rule and is preempted--unless it also falls within that rule's exception for "licensing and similar laws." Unlike the Court, I do not believe the state law falls within this exception, and I consequently would hold it preempted.

Arizona calls its state statute a "licensing law," and the statute uses the word "licensing." But the statute strays beyond the bounds of the federal licensing exception, for it defines "license" to include articles of incorporation and partnership certificates, indeed virtually every state-law authorization for any firm, corporation, or partnership to do business in the State. Congress did not intend its "licensing" language to create so broad an exemption, for doing so would permit States to eviscerate the federal Act's preemption provision, indeed to subvert the Act itself, by undermining Congress' efforts (1) to protect lawful workers from national-origin-based discrimination and (2) to protect lawful employers against erroneous prosecution or punishment.

Dictionary definitions of the word "licensing" are, as the majority points out, broad enough to include virtually any permission that the State chooses to call a "license." But neither dictionary definitions nor the use of the word "license" in an unrelated statute can demonstrate what scope Congress intended the word "licensing" to have as it used that word in this federal statute. Instead, statutory context must ultimately determine the word's coverage. Context tells a driver that he cannot produce a partnership certificate when a policeman stops the car and asks for a license. Context tells all of us that "licensing" as used in the Act does not include marriage licenses or the licensing of domestic animals. And context, which includes statutory purposes, language, and history, tells us that the federal statute's "licensing" language does not embrace Arizona's overly broad definition of that term. That is to say, ordinary corporate charters, certificates of partnership, and the like do not fall within the scope of the word "licensing" as used in this federal exception.

I would read the words "licensing and similar laws" as covering state licensing systems applicable primarily to the licensing of firms in the business of recruiting or referring workers for employment, such as the state agricultural labor contractor licensing schemes in existence when the federal Act was created. Reading the phrase as limited in scope to laws licensing businesses that recruit or refer workers for employment is consistent with the statute's language, with the relevant history, and with other statutory provisions in the Act. That reading prevents state law from undermining the Act and from turning the preemption clause on its head. That is why I

consider it the better reading of the statute.

Another section of the Arizona statute requires "every employer, after hiring an employee," to "verify the employment eligibility of the employee" through the Federal Government's E-Verify program. This state provision makes participation in the federal E-Verify system mandatory for virtually all Arizona employers. The federal law governing the E-Verify program, however, creates a program that is voluntary. By making mandatory that which federal law seeks to make voluntary, the state provision stands as a significant "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." And it is consequently pre-empted.

For these reasons I would hold that the federal Act, including its E-Verify provisions, preempts Arizona's state law. With respect, I dissent from the majority's contrary holdings.

**Justice Sotomayor, dissenting.**

In enacting the Immigration Reform and Control Act of 1986 (IRCA), Congress created a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." The Court reads IRCA's saving clause to permit States to determine for themselves whether someone has employed an unauthorized alien so long as they do so in conjunction with licensing sanctions. This reading of the saving clause cannot be reconciled with the rest of IRCA's comprehensive scheme. Having constructed a federal mechanism for determining whether someone has knowingly employed an unauthorized alien, and having withheld from the States the information necessary to make that determination, Congress could not plausibly have intended for the saving clause to operate in the way the majority reads it to do. When viewed in context, the saving clause can only be understood to preserve States' authority to impose licensing sanctions after a final federal determination that a person has violated IRCA by knowingly employing an unauthorized alien. Because the Legal Arizona Workers Act creates a separate state mechanism for Arizona courts to determine whether a person has employed an unauthorized alien, I would hold that it falls outside the saving clause and is preempted.

I would also hold that federal law preempts the provision of the Arizona Act making mandatory the use of E-Verify, the federal electronic verification system. By requiring Arizona employers to use E-Verify, Arizona has effectively made a decision for Congress regarding use of a federal resource, in contravention of the significant policy objectives motivating Congress' decision to make participation in the E-Verify program voluntary.

I begin with the plain text of IRCA's preemption clause. IRCA expressly preempts States from "imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." The Arizona Act, all agree, imposes civil sanctions upon those who employ unauthorized aliens. The Act thus escapes express preemption only if it falls within IRCA's parenthetical saving clause for "licensing and similar laws."

Because the plain text of the saving clause does not resolve the question, it is necessary to look to the text of IRCA as a whole to illuminate Congress' intent.

Before Congress enacted IRCA in 1986, a number of States had enacted legislation

prohibiting employment of unauthorized aliens. Congress enacted IRCA amidst this patchwork of state laws. IRCA " 'forcefully' made combating the employment of illegal aliens central to 'the policy of immigration law.' " Congress made explicit its intent that IRCA be enforced uniformly. IRCA declares that "[i]t is the sense of the Congress that ... the immigration laws of the United States should be enforced vigorously and uniformly." Congress structured IRCA's provisions in a number of ways to accomplish this goal of uniform enforcement.

First, and most obviously, Congress expressly displaced the myriad state laws that imposed civil and criminal sanctions on employers who hired unauthorized aliens. Second, Congress centralized in the Federal Government enforcement of IRCA's prohibition on the knowing employment of unauthorized aliens. IRCA instructs the Attorney General to designate a specialized federal agency unit whose "primary duty" will be to prosecute violations of IRCA. Third, Congress provided persons "adversely affected" by an agency order with a right of review in the federal courts of appeals. Fourth, Congress created a uniquely federal system by which employers must verify the work authorization status of new hires. Finally, Congress created no mechanism for States to access information regarding an alien's work authorization status for purposes of enforcing state prohibitions on the employment of unauthorized aliens.

Collectively, these provisions demonstrate Congress' intent to build a centralized, exclusively federal scheme for determining whether a person has "employ[ed], or recruit[ed] or refer[red] for a fee for employment, unauthorized aliens."

IRCA's saving clause must be construed against this backdrop. Focusing primarily on the text of the saving clause, Arizona and the majority read the clause to permit States to determine themselves whether a person has employed an unauthorized alien, so long as they do so in connection with licensing sanctions. This interpretation overlooks the broader statutory context and renders the statutory scheme "[in]coherent and [in]consistent." Given Congress' express goal of "unifor[m]" enforcement of "the immigration laws of the United States," I cannot believe that Congress intended for the 50 States and countless localities to implement their own enforcement and adjudication procedures for deciding whether employers have employed unauthorized aliens. Reading the saving clause as the majority does subjects employers to a patchwork of enforcement schemes similar to the one that Congress sought to displace when it enacted IRCA. Having carefully constructed a uniform federal scheme for determining whether a person has employed an unauthorized alien, Congress could not plausibly have meant to create such a gaping hole in that scheme through the undefined, parenthetical phrase "licensing and similar laws."

In sum, the statutory scheme as a whole defeats Arizona's and the majority's reading of the saving clause. Congress would not sensibly have permitted States to determine for themselves whether a person has employed an unauthorized alien, while at the same time creating a specialized federal procedure for making such a determination, withholding from the States the information necessary to make such a determination, and precluding use of the I-9 forms in nonfederal proceedings. To render IRCA's saving clause consistent with the statutory scheme, I read the saving clause to permit States to impose licensing sanctions following a final federal determination that a person has violated §1324a(a)(1)(A) by knowingly hiring, recruiting, or referring for a fee an unauthorized alien. This interpretation both is faithful to the saving clause's text, and best reconciles the saving clause with IRCA's "careful regulatory scheme."

## Arizona v. United States

132 Sup. Ct. 2492 (2012)

Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, and Sotomayor, JJ., joined. Scalia, J., Thomas, J., and Alito, J., filed opinions concurring in part and dissenting in part. Kagan, J., took no part in the consideration or decision of the case.

**Justice Kennedy** delivered the opinion of the Court.

To address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country, the State of Arizona in 2010 enacted a statute called the Support Our Law Enforcement and Safe Neighborhoods Act. The law is often referred to as S. B. 1070, the version introduced in the state senate. Its stated purpose is to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." The law's provisions establish an official state policy of "attrition through enforcement." The question before the Court is whether federal law preempts and renders invalid four separate provisions of the state law.

### I

The United States filed this suit against Arizona, seeking to enjoin S. B. 1070 as preempted. Four provisions of the law are at issue here. Two create new state offenses. Section 3 makes failure to comply with federal alien-registration requirements a state misdemeanor. Section 5, in relevant part, makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State; this provision is referred to as §5(C). Two other provisions give specific arrest authority and investigative duties with respect to certain aliens to state and local law enforcement officers. Section 6 authorizes officers to arrest without a warrant a person "the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States." Section 2(B) provides that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person's immigration status with the Federal Government.

### II

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization," U. S. Const., Art. I, §8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations.

The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad.

It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with

one national sovereign, not the 50 separate States. This Court has reaffirmed that "[o]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country." *Hines v. Davidowitz*, 312 U. S. 52, 64 (1941).

Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. Congress has specified which aliens may be removed from the United States and the procedures for doing so.

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration. Hundreds of thousands of deportable aliens are apprehended in Arizona each year. Unauthorized aliens who remain in the State comprise, by one estimate, almost six percent of the population. And in the State's most populous county, these aliens are reported to be responsible for a disproportionate share of serious crime. Statistics alone do not capture the full extent of Arizona's concerns. Accounts in the record suggest there is an "epidemic of crime, safety risks, serious property damage, and environmental problems" associated with the influx of illegal migration across private land near the Mexican border.

### III

Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect. From the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes. The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Under this principle, Congress has the power to preempt state law. There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision. See, e.g., *Chamber of Commerce v. Whiting*, 563 U. S. \_\_\_, \_\_\_ (2011).

State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent to displace

state law altogether can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Second, state laws are preempted when they conflict with federal law. This includes cases where "compliance with both federal and state regulations is a physical impossibility," and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In preemption analysis, courts should assume that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress."

The four challenged provisions of the state law each must be examined under these preemption principles.

#### IV

##### Section 3

Section 3 of S. B. 1070 creates a new state misdemeanor. It forbids the "willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code section 1304(e) or 1306(a)." In effect, §3 adds a state-law penalty for conduct proscribed by federal law. The United States contends that this state enforcement mechanism intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate.

The Court discussed federal alien-registration requirements in *Hines v. Davidowitz*, 312 U. S. 52. In 1940, as international conflict spread, Congress added to federal immigration law a "complete system for alien registration." The Court found that Congress intended the federal plan for registration to be a "single integrated and all-embracing system." Because this "complete scheme . . . for the registration of aliens" touched on foreign relations, it did not allow the States to "curtail or complement" federal law or to "enforce additional or auxiliary regulations."

The framework enacted by Congress leads to the conclusion here, as it did in *Hines*, that the Federal Government has occupied the field of alien registration. The federal statutory directives provide a full set of standards governing alien registration, including the punishment for noncompliance. It was designed as a "harmonious whole." Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.

Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders. If §3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations, "diminish[ing] the [Federal Government]'s control over enforcement" and "detract[ing] from the 'integrated scheme of regulation' created by Congress."

Arizona contends that §3 can survive preemption because the provision has the same aim as federal law and adopts its substantive standards. This argument not only ignores the basic premise of field preemption--that States may not enter, in any respect, an area the Federal



Government has reserved for itself--but also is unpersuasive on its own terms. Permitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted. Were §3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.

As it did in *Hines*, the Court now concludes that, with respect to the subject of alien registration, Congress intended to preclude States from "complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations." Section 3 is preempted by federal law.

#### Section 5(C)

Unlike §3, which replicates federal statutory requirements, §5(C) enacts a state criminal prohibition where no federal counterpart exists. The provision makes it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona. Violations can be punished by a \$2,500 fine and incarceration for up to six months. The United States contends that the provision upsets the balance struck by the Immigration Reform and Control Act of 1986 (IRCA) and must be preempted as an obstacle to the federal plan of regulation and control.

Congress enacted IRCA as a comprehensive framework for "combating the employment of illegal aliens." The law makes it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. It also requires every employer to verify the employment authorization status of prospective employees. These requirements are enforced through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions. This comprehensive framework does not impose federal criminal sanctions on the employee side (i.e., penalties on aliens who seek or engage in unauthorized work). Under federal law some civil penalties are imposed instead.

The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work--aliens who already face the possibility of employer exploitation because of their removable status--would be inconsistent with federal policy and objectives.

The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Under §5(C) of S. B. 1070, Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although §5(C) attempts to achieve one of the same goals as federal law--the deterrence of unlawful employment--it involves a conflict in the method of enforcement. The Court has recognized that a "[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy." The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the

contrary is an obstacle to the regulatory system Congress chose. Section 5(C) is preempted by federal law.

## Section 6

Section 6 of S. B. 1070 provides that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States." The United States argues that arrests authorized by this statute would be an obstacle to the removal system Congress created.

As a general rule, it is not a crime for a removable alien to remain present in the United States. If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent. When an alien is suspected of being removable, a federal official issues an administrative document called a Notice to Appear. The form does not authorize an arrest. Instead, it gives the alien information about the proceedings, including the time and date of the removal hearing. If an alien fails to appear, an in absentia order may direct removal.

The federal statutory structure instructs when it is appropriate to arrest an alien during the removal process. For example, the Attorney General can exercise discretion to issue a warrant for an alien's arrest and detention "pending a decision on whether the alien is to be removed from the United States." And if an alien is ordered removed after a hearing, the Attorney General will issue a warrant. In both instances, the warrants are executed by federal officers who have received training in the enforcement of immigration law.

Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers. Under state law, officers who believe an alien is removable by reason of some "public offense" would have the power to conduct an arrest on that basis regardless of whether a federal warrant has issued or the alien is likely to escape. This state authority could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case. This would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed.

This is not the system Congress created. Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer. A principal example is when the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government.

By authorizing state officers to decide whether an alien should be detained for being removable, §6 violates the principle that the removal process is entrusted to the discretion of the Federal Government. A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice. Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances. By nonetheless authorizing state and local officers to engage in these enforcement activities as a general matter, §6 creates an obstacle to the

full purposes and objectives of Congress. Section 6 is preempted by federal law.

#### Section 2(B)

Section 2(B) of S. B. 1070 requires state officers to make a "reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." The law also provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." The accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records.

Three limits are built into the state provision. First, a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification. Second, officers "may not consider race, color or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s]." Third, the provisions must be "implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."

The United States and its amici contend that, even with these limits, the State's verification requirements pose an obstacle to the framework Congress put in place. The first concern is the mandatory nature of the status checks. The second is the possibility of prolonged detention while the checks are being performed.

Consultation between federal and state officials is an important feature of the immigration system. Congress has made clear that no formal agreement or special training needs to be in place for state officers to "communicate with the [Federal Government] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States." And Congress has obligated ICE to respond to any request made by state officials for verification of a person's citizenship or immigration status.

Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations. Indeed, it has encouraged the sharing of information about possible immigration violations. The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter.

Some who support the challenge to §2(B) argue that, in practice, state officers will be required to delay the release of some detainees for no reason other than to verify their immigration status. Detaining individuals solely to verify their immigration status would raise constitutional concerns. And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision. The program put in place by Congress does not allow state or local officers to adopt this enforcement mechanism.

The nature and timing of this case counsel caution in evaluating the validity of §2(B). The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. There is a basic uncertainty about what the law means and

how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that creates a conflict with federal law. As a result, the United States cannot prevail in its current challenge. This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.

V

Immigration policy shapes the destiny of the Nation. The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.

The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

**Justice Scalia**, concurring in part and dissenting in part.

The United States is an indivisible "Union of sovereign States." Today's opinion deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there. Neither the Constitution itself nor even any law passed by Congress supports this result. I dissent.

I

As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. In light of the predominance of federal immigration restrictions in modern times, it is easy to lose sight of the States' traditional role in regulating immigration--and to overlook their sovereign prerogative to do so. I accept as a given that State regulation is excluded by the Constitution when (1) it has been prohibited by a valid federal law, or (2) it conflicts with federal regulation--when, for example, it admits those whom federal regulation would exclude, or excludes those whom federal regulation would admit.

Possibility (1) need not be considered here: there is no federal law prohibiting the States' sovereign power to exclude (assuming federal authority to enact such a law). The mere existence of federal action in the immigration area--and the so-called field preemption upon which the Court's opinion so heavily relies, cannot be regarded as such a prohibition. We are not talking here about a federal law prohibiting the States from regulating bubble-gum advertising, or even the construction of nuclear plants. We are talking about a federal law going to the core of state sovereignty: the power to exclude. Like elimination of the States' other inherent sovereign power, immunity from suit, elimination of the States' sovereign power to exclude requires that "Congress . . . unequivocally expres[s] its intent to abrogate," Implicit "field preemption" will not do.

Nor can federal power over illegal immigration be deemed exclusive because of what the

Court's opinion solicitously calls "foreign countries[ ' ] concern[s] about the status, safety, and security of their nationals in the United States." Even in its international relations, the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers.

What this case comes down to, then, is whether the Arizona law conflicts with federal immigration law--whether it excludes those whom federal law would admit, or admits those whom federal law would exclude. It does not purport to do so. It applies only to aliens who neither possess a privilege to be present under federal law nor have been removed pursuant to the Federal Government's inherent authority. I proceed to consider the challenged provisions.

## §2(B)

The Government has conceded that "even before Section 2 was enacted, state and local officers had state-law authority to inquire of the Department of Homeland Security about a suspect's unlawful status and otherwise cooperate with federal immigration officers." That concession obviates the need for further inquiry. The Court therefore properly rejects the Government's challenge, recognizing that, "[a]t this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2B will be construed in a way that creates a conflict with federal law."

## §6

"A peace officer, without a warrant, may arrest a person if the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States." This provision of S. B. 1070 expands the statutory list of offenses for which an Arizona police officer may make an arrest without a warrant. The Government's primary contention is that §6 is pre-empted by federal immigration law because it allows state officials to make arrests "without regard to federal priorities." The Court's opinion focuses on limits that Congress has placed on federal officials' authority to arrest removable aliens and the possibility that state officials will make arrests "to achieve [Arizona's] own immigration policy" and "without any input from the Federal Government."

Arizona is entitled to have "its own immigration policy"--including a more rigorous enforcement policy--so long as that does not conflict with federal law. The Court says that "it is not a crime for a removable alien to remain present in the United States." It is not a federal crime, to be sure. But there is no reason Arizona cannot make it a state crime for a removable alien to remain present in Arizona. The State has the sovereign power to protect its borders more rigorously if it wishes, absent any valid federal prohibition. The Executive's policy choice of lax federal enforcement does not constitute such a prohibition.

## §3

"In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 [U. S. C.] §1304(e) or §1306(a)." It is beyond question that a State may make violation of federal law a violation of state law as well. "[T]he State is not inhibited from making the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing

the accomplishment of such purposes." Much more is that so when, as here, the State is protecting its own interest, the integrity of its borders.

The Court points out, however, that in some respects the state law exceeds the punishments prescribed by federal law. The answer is that it makes no difference. Illegal immigrants who violate §3 violate *Arizona* law. It is one thing to say that the Supremacy Clause prevents Arizona law from excluding those whom federal law admits. It is quite something else to say that a violation of Arizona law cannot be punished more severely than a violation of federal law. Especially where (as here) the State is defending its own sovereign interests, there is no precedent for such a limitation.

It holds no fear for me, as it does for the Court, that "[w]ere §3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." That seems to me entirely appropriate when the State uses the federal law (as it must) as the criterion for the implementation of its own policies of excluding those who do not belong there. What I do fear--and what Arizona and the States that support it fear--is that "federal policies" of nonenforcement will leave the States helpless before those evil effects of illegal immigration that the Court's opinion dutifully recites in its prologue but leaves unremedied in its disposition.

#### §5(C)

"It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." The Court concludes that §5(C) "would interfere with the careful balance struck by Congress," (another field pre-emption notion, by the way) but that is easy to say and impossible to demonstrate. The Court relies primarily on the fact that "[p]roposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting [the Immigration Reform and Control Act of 1986 (IRCA)]," "[b]ut Congress rejected them." There is no more reason to believe that this rejection was expressive of a desire that there be no sanctions on employees, than expressive of a desire that such sanctions be left to the States.

The Court opinion's looming specter of inutterable horror--"[i]f §3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations," seems to me not so horrible and even less looming. But there has come to pass, and is with us today, the specter that Arizona and the States that support it predicted: A Federal Government that does not want to enforce the immigration laws as written, and leaves the States' borders unprotected against immigrants whom those laws would exclude. So the issue is a stark one. Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws?

As is often the case, discussion of the dry legalities that are the proper object of our attention suppresses the very human realities that gave rise to the suit. Arizona bears the brunt of the country's illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their

lives in jeopardy. Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so.

Arizona has moved to protect its sovereignty--not in contradiction of federal law, but in complete compliance with it. The laws under challenge here do not extend or revise federal immigration restrictions, but merely enforce those restrictions more effectively. If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State. I dissent.

**Justice Thomas**, concurring in part and dissenting in part.

I agree with Justice Scalia that federal immigration law does not pre-empt any of the challenged provisions of S. B. 1070. I reach that conclusion, however, for the simple reason that there is no conflict between the "ordinary meanin[g]" of the relevant federal laws and that of the four provisions of Arizona law at issue here.

Despite the lack of any conflict between the ordinary meaning of the Arizona law and that of the federal laws at issue here, the Court holds that various provisions of the Arizona law are pre-empted because they "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." I have explained that the "purposes and objectives" theory of implied pre-emption is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text. Under the Supremacy Clause, pre-emptive effect is to be given to congressionally enacted laws, not to judicially divined legislative purposes. Thus, even assuming the existence of some tension between Arizona's law and the supposed "purposes and objectives" of Congress, I would not hold that any of the provisions of the Arizona law at issue here are pre-empted on that basis.

**Justice Alito**, concurring in part and dissenting in part.

I agree that §2(B) is not pre-empted. That provision does not authorize or require Arizona law enforcement officers to do anything they are not already allowed to do under federal law. The United States' argument that §2(B) is pre-empted simply by the Executive's current enforcement policy is an astounding assertion of federal executive power that the Court rightly rejects.

I also agree with the Court that §3 is pre-empted by virtue of our decision in *Hines v. Davidowitz*, 312 U. S. 52 (1941). Our conclusion in that case that Congress had enacted an "all-embracing system" of alien registration and that States cannot "enforce additional or auxiliary regulations" forecloses Arizona's attempt here to impose additional, state-law penalties for violations of the federal registration scheme.

While I agree with the Court on §2(B) and §3, I part ways on §5(C) and §6. Because state police powers are implicated here, our precedents require us to presume that federal law does not displace state law unless Congress' intent to do so is clear and manifest. I do not believe Congress has spoken with the requisite clarity to justify invalidation of §5(C). Nor do I believe that §6 is invalid. Like §2(B), §6 adds virtually nothing to the authority that Arizona law enforcement officers already exercise. And whatever little authority they have gained is consistent with federal law.