

No. 07-3531

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PEDRO LOZANO *et al.*,

Plaintiffs-Appellees,

v.

CITY OF HAZLETON,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Pennsylvania

**BRIEF OF *AMICUS CURIAE* CHANGE TO WIN
IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE**

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INTEREST OF *AMICUS CURIAE*

Amicus Change to Win is a labor federation of seven national and international labor unions – the International Brotherhood of Teamsters, Laborers’ International Union of North America, Service Employees International Union, UNITE HERE, United Brotherhood of Carpenters and Joiners of America, United Farm Workers of America, and United Food and Commercial Workers International Union – which collectively represent approximately six million working men and women throughout the United States. As set forth in Change to Win’s constitution, among the objects and purposes of the organization are: to promote “fairness at work”; to “ensure equal opportunity and rights for all women and men of every race, religion, ethnicity, age, sexual orientation, ability, gender identity and expression, national origin and immigration status”; and to “fight for fair treatment and legal protection for immigrant workers in this country.”

These objectives lead Change to Win and its constituent unions to oppose the proliferation of state and local laws that – like the City of Hazleton ordinance at issue here – seek to upset the delicate balance among competing policy objectives Congress struck when in 1986 it enacted, through the Immigration Reform and Control Act of 1986 (“IRCA”), a carefully calibrated regime of employer sanctions for the employment of undocumented immigrants. Change to Win therefore urges

this Court to affirm the judgment of the district court striking down the Hazleton ordinance and enjoining its further implementation.

This brief *amicus curiae* is filed with the consent of all parties, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

ARGUMENT

While we agree with plaintiffs that the Hazleton ordinances are unconstitutional in their entirety, our principal interest – and our exclusive focus in this *amicus* brief – is on the ordinances’ employment provisions. And, while we endorse plaintiffs’ arguments on all of the constitutional issues discussed in their brief, we limit our submission to two aspects of the question whether the employment ordinance is preempted by the IRCA.

In particular, we focus our attention on the effect of the so-called “savings clause,” a seven-word parenthetical within IRCA’s express preemption provision, 8 U.S.C. § 1324a(h)(2). We first show that the existence of this savings clause has no impact on consideration of whether the Hazleton ordinance is impliedly preempted under the ordinary principles of conflict preemption as posing an obstacle to the realization of Congress’ purposes and objectives in enacting the IRCA. That being the case, the ordinance is preempted for the reasons set forth in plaintiffs’ brief.

We then turn to the express preemption clause itself, and show that the Hazleton ordinance cannot be deemed to fall within the clause’s exception for “licensing and similar laws,” and that it is therefore, in the alternative, preempted under the express terms of the federal statute.

I. THE IRCA’S “SAVINGS CLAUSE” LIMITS THE SCOPE OF THE ACT’S EXPRESS PREEMPTION PROVISION BUT DOES NOT AFFECT THE APPLICATION TO THE HAZLETON ORDINANCE OF ORDINARY PRINCIPLES OF CONFLICT PREEMPTION

In their brief, plaintiffs demonstrate why, under ordinary principles of conflict preemption, the employment provisions of the Hazleton ordinance are in conflict with the regime of employer sanctions established by the IRCA because they “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). See Brief of Appellees [hereinafter Pl. Br.] at 49-64. We see no need to burden the Court with additional argument on why the Hazleton ordinance’s imposition of the penalty of suspending an entity’s business permit, and its establishment of a regime of “strict liability” through its private right of action, cannot possibly coexist with the careful balance Congress struck among the competing objectives in attempting to deter the employment of undocumented workers but at a minimal cost to business and to lawful employees.

Rather, we limit our discussion of conflict preemption to a single point, one that – at least implicitly – seems to underlie much of the argument on the other side of this issue. This is the contention that, in including an exception for “licensing and similar laws” in IRCA’s express preemption provision, 8 U.S.C.

§ 1324a(h)(2),¹ Congress – as the City of Hazleton views it – “expressly *permitted*” such state and local restrictions as fall within that exception. Brief of Appellant [hereinafter “Hazleton Br.”] at 39 (emphasis in original). Not only does the City read the statute in that way, but the same view is articulated in the recent decision of a federal district court upholding an Arizona statute similar to Hazleton’s ordinance: “[I]f the [state] Act constitutes a licensing or similar law, *it is expressly authorized* by IRCA’s savings clause.” *Arizona Contractors Ass’n v. Candelaria*, 534 F. Supp. 2d 1036, 1045-46 (D. Ariz. 2008) (emphasis added); *see also Gray v. City of Valley Park*, No. 4:07-cv-881-ERW, 2008 WL 294294, at *12 n.16 (E.D. Mo. Jan. 31, 2008) (noting the “difficult[y]” of any implied preemption argument in light of “the express preemption provision which allows licensing laws”).

Such arguments fail to apply controlling Supreme Court precedent, and they also constitute a misreading of the plain language of the IRCA savings clause.

¹ This provision reads in full as follows: “The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. § 1324a(h)(2).

1. As plaintiffs briefly point out, Pl. Br. at 49-50, arguments against conflict preemption that rest on an implication drawn from an express preemption provision and its savings clause should have been laid to rest by the Supreme Court's decision in *Geier*. Like this case, *Geier* involved a federal statute that contained both an express preemption provision and a savings clause. The Court held that the latter "removes tort actions from the scope of the express pre-emption clause," 529 U.S. at 869, and thus "the express pre-emption provision does not of its own force pre-empt" the tort claim at issue. *Id.* at 870.

The Court then asked whether the savings clause "foreclose[s] or limit[s] the operation of ordinary [implied] pre-emption principles," *id.* at 869, and it answered that question in the negative. *Id.* at 869-74. Emphasizing that it had "repeatedly 'decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law,'" *id.* at 870 (quoting *United States v. Locke*, 529 U.S. 89, 106 (2000)), the Court emphatically rejected the dissent's contention that "the pre-emption provision, the saving provision, or both together, create some kind of 'special burden' beyond that inherent in ordinary pre-emption principles" *Id.* Rather, "[t]he two provisions, read together, reflect a neutral policy, not a specially favorable or unfavorable policy, toward the application of ordinary conflict pre-emption principles." *Id.* at 870-71.

2. Equally important is a second consideration. The statutory language itself, which Congress chose to use in writing the IRCA savings clause, makes abundantly clear that this provision does no more than exclude “licensing and similar laws” from the scope of IRCA’s express preemption clause, and that it does not “expressly authorize” or “expressly permit” states and localities to enact such laws without regard to the impact they may have on the “purposes and objectives of Congress” in enacting the IRCA.

In fact, Congress knows very well how to write a savings clause that *does* affirmatively authorize state and local governments to legislate in the same area as a federal statute, and that effectively displaces any consideration of the ordinary conflict preemption principle that a state law remains in force if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* at 873. When Congress wants to override any possibility of conflict preemption and affirmatively authorize states to legislate on a particular issue without regard to consideration of whatever “obstacles” such legislation may pose to the federal legislative purposes and objectives, it uses language like this:

Nothing in this Act or the Act of March 3, 1851 shall –

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to –

(A) the discharge of oil or other pollution by oil within such State

33 U.S.C. § 2718(a) (emphasis added) (quoted in *Locke*, 529 U.S. at 104).

Language of this type – “nothing in this Act” or “nothing in this chapter” – is in fact extraordinarily common in the United States Code.² Title VII of the Civil Rights Act of 1964, for example, contains the following non-preemption language:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State

42 U.S.C. § 2000e-7 (emphasis added). The same kind of broad language is found in the Labor-Management Reporting and Disclosure Act of 1959:

Except as explicitly provided to the contrary, *nothing in this chapter* shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization . . . under the laws of any State, and, except as explicitly provided to the contrary, *nothing in this chapter* shall take away any right or bar any remedy to which members of a labor organization are entitled under . . . [the] law of any State.

29 U.S.C. § 523 (a) (emphasis added); *see also id.*, § 524 (“Nothing in this chapter shall be construed to impair or diminish the authority of any State to enact and enforce [certain criminal laws].”). And, to cite one final example, the same kind of savings clause is to be found in the Employee Retirement Income Security Act of 1974 (“ERISA”):

² While we cite only a few examples in text, provisions of this type are in fact ubiquitous: a Westlaw search disclosed at least 22 non-preemption clauses using this form in the randomly chosen Title 15 of the United States Code alone.

Except as provided in subparagraph (B), *nothing in this subchapter* shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

29 U.S.C. § 1144(b)(2)(A) (emphasis added).

The ERISA savings clause is of particular relevance, for it is paired in the same statutory section with a nonpreemption clause of extraordinarily broad scope, *see id.* at § 1144(a) (preempting, except as provided in subsection (b), all state laws that “relate to” an employee benefit plan). But, as to the field of laws “regulat[ing] insurance, banking, or securities,” the savings clause not only states an exception to the preemption clause, but through its “nothing in this subchapter” language affirmatively removes state laws in those fields from any implied preemption as well.

It is thus clear that Congress routinely writes non-preemption clauses that *do* have the effect of excluding any implied preemption of state law. But it is equally clear that the IRCA savings clause is not of this type. It is unlike the broad non-preemption clauses quoted above that not only state an exception to an express preemption clause but also – through their “nothing in this Act” language” – exclude an inference of preemption based on anything in the statute. Rather, the language of the IRCA parenthetical – “other than through licensing and similar laws” – plainly does no more than state an exception to the express preemption rule articulated in the sentence in which this parenthetical phrase is embedded.

Had Congress intended, in enacting the IRCA, to establish a broad non-preemption rule for “licensing and similar laws,” it surely knew how to do that. The contrast between the IRCA language and the statutory provisions in which Congress did affirmatively exclude any implied preemption argument confirms what should already be apparent from the grammar of the IRCA savings clause itself – that it does no more than limit the scope of the IRCA express preemption provision of which it is a part.

Accordingly, whether or not the Hazleton ordinance falls within the scope of “licensing and similar laws” so as to be removed from express preemption under § 1324a(h)(2) – an issue we address below – it is more than clear that the parenthetical savings clause of that section has no effect, one way or the other, on the analysis of whether the ordinance is impliedly preempted through application of the ordinary principles of conflict preemption. As the Supreme Court has put it, the preemption clause and its “savings clause” exception, read together, impose no “special burden” on the party arguing for implied preemption, but rather are “neutral” as to that question. *Geier*, 529 U.S. at 870-71.

That being the case, it is clear for the reasons set forth by plaintiffs that the Hazleton ordinance poses an obstacle to the congressional objectives and purposes of the IRCA and that it therefore is in conflict with that statute and is preempted, without any regard to the express preemption provision of § 1324a(h)(2).

II. THE HAZLETON ORDINANCE IS NOT A “LICENSING [OR] SIMILAR LAW” THAT IS EXCLUDED FROM THE IRCA’S EXPRESS PREEMPTION CLAUSE

1. As the plaintiffs have explained, Pl. Br. at 50-52, Congress’ enactment in 1986, after years of deliberation, of a comprehensive regime of employer sanctions for the employment of undocumented immigrants was the product of difficult compromises that balanced a myriad of competing policy and political concerns. Thus, while Congress prohibited employers from hiring undocumented immigrants, it imposed relatively mild penalties for initial infractions, allowed employers a “safe harbor” defense if they followed the I-9 verification process, balanced the ban on hiring undocumented workers with a prohibition on discrimination in employment on the basis of alienage, and excluded union hiring-hall employment referrals from the scope of the statutory prohibitions.

Given the delicate compromises and balances that went into the IRCA, it is clear why Congress found it essential to prevent state and local governments from enacting their own laws sanctioning the employment of undocumented workers which – even if motivated by the same general objective as the IRCA – would risk upsetting the difficult balance that Congress had struck. The result – itself doubtless part of that balance – was IRCA’s express preemption clause:

The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar

laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. § 1324a(h)(2).

There is no real dispute that the employment provisions of the Hazleton ordinance are preempted by this language – *unless* the ordinance is deemed to fall within the exception for “licensing and similar laws.”

In assessing the City of Hazleton’s contention that its ordinance is protected from express preemption by this savings clause, it is essential to remember that, as the Supreme Court has emphasized, the scope of such a savings clause must be construed in the context of the statute as a whole. Justice O’Connor, writing for a unanimous Court, explained this point in interpreting ERISA’s savings clause for statutes regulating insurance:

[W]e are obliged in interpreting the saving clause to consider . . . the role of the saving clause in ERISA as a whole. On numerous occasions we have noted that “[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” Because in this case, the state cause of action seeks remedies for the improper processing of a claim for benefits under an ERISA-regulated plan, our understanding of the saving clause must be informed by the legislative intent concerning the civil enforcement provisions provided by ERISA § 502(a), 29 U.S.C. § 1132(a).

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51-52 (1987) (internal citations and quotation marks omitted).

Similarly in this case, interpretation of the exception Congress provided for “licensing and similar laws” must be informed by Congress’ intent in enacting the enforcement provisions of IRCA. For that reason, as Justice Kennedy wrote – again for a unanimous Court in *United States v. Locke* – the Court will “decline to give broad effect to saving clauses where doing so *would upset the careful regulatory scheme established by federal law.*” 529 U.S. at 106 (emphasis added) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992); *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998)). See also *Pilot Life*, 481 U.S. at 54 (interpreting savings clause narrowly where “[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA”). And, as the Court has often emphasized, “the range and nature of those remedies that are and are not available is a fundamental part’ of the comprehensive system established by Congress.” *Wisconsin Dep’t of Indus. v. Gould Inc.*, 475 U.S. 282, 287 (1986).

There is no question that the enforcement regime Congress enacted in the IRCA, including its choice of the “remedies that are and are not available,” *id.*, is just such a “careful regulatory scheme established by federal law.” *Locke*, 529 U.S. at 106. And it is equally evident that the balances Congress struck in enacting

that scheme would be subverted if states and municipalities were – to cite just a few examples – to replace IRCA’s \$375 citation for first-offense violations with the “death penalty” of withdrawing an employer’s business license; to nullify IRCA’s “safe harbor” for employers who comply with the I-9 verification procedures; to substitute a regime of strict liability (as does Hazleton’s private right of action) for IRCA’s scienter requirement of “knowing” violations; to replace IRCA’s judicial mechanisms for adjudicating violations of the statute with Hazleton’s determination by a Code Enforcement Official of whether an employer has produced proper “identity information” for an employee about whom a complaint has been lodged; or to change the federal government’s experimental E-Verify program from voluntary to mandatory for certain private-sector employers.

Of course, if the City’s argument were correct that merely imposing the penalty of denying or revoking a business license were sufficient to bring any local legislation regulating the employment of undocumented immigrants within IRCA’s savings clause for “licensing and similar laws,” then states and municipalities would be free, without fearing preemption, to regulate such employment of immigrants in ways that would be far more destructive of the congressional balance even than the measures actually taken by Hazleton. For instance, a state could, on Hazleton’s view of the meaning of § 1324a(h)(2), sanction an employer,

by withdrawing its ability to do business, for the merely negligent (rather than “knowing”) hiring of an undocumented immigrant.

Examination of the specific language of IRCA’s savings clause must, in short, proceed from the premise that Congress could hardly have intended that the difficult balance among competing interests that it struck in enacting IRCA could be so easily and thoroughly upset as the City’s argument would permit.

2. With this background, we turn to the question of what, then, Congress meant when it used the phrase, “licensing and similar laws.”

While Congress left these words undefined in the text of the statute, examination of the historical context in which they were enacted makes clear precisely what Congress had in mind. The Supreme Court, in fact, alluded to the relevant history when – prior to the enactment of the IRCA – it addressed a question of whether the Immigration and Nationality Act (“INA”), as it then existed, preempted state regulation of the employment of undocumented immigrants.³ Answering that question in the negative, the Court cited as evidence

³ As plaintiffs point out, of course, analysis of this question was vastly changed by the enactment of IRCA. *See* Pl. Br. at 52-53. Whereas for the pre-IRCA INA the regulation of the employment of unlawful immigrants “was a merely peripheral concern of the [federal regulation],” *De Canas v. Bica*, 424 U.S. 351, 361 (1976), it is now the focus of a comprehensive federal statutory scheme, in place for over twenty years, which has “made combating the employment of illegal aliens central to ‘[t]he policy of immigration law.’” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

of congressional intent Congress' treatment of farm labor contractors. While the federal Farm Labor Contractor Registration Act "authorize[d] revocation of the certificate of registration of any farm labor contractor found to have employed" an undocumented alien, the Court pointed to a provision of that Act in which Congress made clear its intent that state laws dealing with the licensing of farm labor contractors not be preempted. *De Canas v. Bica*, 424 U.S. 351, 361-62 (1976).

As plaintiffs' brief points out, when IRCA was enacted in 1986, a number of states had on their books such "licensing" or "registration" laws for farm labor contractors that prohibited these contractors from hiring undocumented workers, *see* Pl. Br. at 72-74, and it was precisely such state licensing laws that Congress intended to exclude from IRCA's express preemption: "[T]he Committee does not intend to preempt licensing or 'fitness to do business laws,' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens." H.R. Rep. No. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.⁴

⁴ The contention underlying the City's briefing of this issue – that the Court is prohibited from consulting IRCA's legislative history for whatever clues it may offer about what Congress meant by "licensing and similar laws" – rests on the contention that the meaning of that phrase is plain on its face. Hazleton Br. at 42-

Even if, moreover, the IRCA provision excepting “licensing and similar laws” from the scope of the statute’s express preemption were to be construed as encompassing more than the limited field of farm labor contractor licensing, it could at the most extend only to laws licensing businesses that, in similar fashion, supply labor in industries other than farming and forestry. While farm labor contractors were clearly the focus of Congress’ concern, it might be argued that state laws licensing the same kind of activity in other contexts – such as, for example, temporary employment agencies – would fall within the scope of the IRCA parenthetical as well.

The history and context of the IRCA and of this provision thus make it clear – as plaintiffs have shown at greater length, *see* Pl. Br. at 72-75 – that Congress did not intend this savings clause to apply more broadly than to state laws that license entities that are in the business of supplying labor to employers. And, in any event, the Hazleton ordinance does not even properly raise the question of whether

47. That assertion, however, depends on the highly questionable assumption that a “licensing” law is *any* law in which the withdrawal of a license is imposed as a sanction – rather than the kind of law that establishes standards and procedures for granting and denying licenses. To suggest that the Court may not consult whatever legislative history is available, along with taking account of the object and policy of the entire statute, in attempting to ascertain Congress’ intended meaning, would be to reject analytical tools that the Supreme Court regularly employs in addressing questions of this kind. *See, e.g., Rowe v. New Hampshire Motor Transp. Ass’n*, 128 S. Ct. 989, 994-95, 996 (2008) (considering, over the objection of only a single Justice, legislative history in determining congressional intent on preemption issue); *cf. id.* at 999 (Scalia, J., concurring in part).

Congress intended the IRCA savings clause to apply more broadly so as to encompass state laws licensing types of activity different from that of the labor contractors with which it was obviously concerned. Whatever the scope of the § 1324a(h)(2) exception for “licensing and similar laws,” the Hazleton ordinance cannot, by any stretch of the imagination, be described as anything remotely similar to a “licensing” law – one that sets forth qualifications, requirements, and procedures for obtaining a license or permit to engage in a certain kind of activity.

The Hazleton ordinance at issue here is not such a “licensing” law, nor is it “similar” to a licensing law. It is not a law regulating the fitness to do business of entities wishing to operate in Hazleton; nor is it integrated into any such regulatory scheme. It is, rather, a law whose sole purpose and effect is to prohibit the employment of undocumented immigrants within the City of Hazleton. The ordinance makes it “unlawful for any business entity to knowingly recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City,” and it imposes civil sanctions on employers whom the City determines to have violated the ordinance.

The only respect in which the ordinance has anything at all to do with “licensing” is that it uses withdrawal of the entity’s business license as its principal penalty (in addition to the threat of a private right of action by any discharged

employee) for the employment of undocumented immigrants. But the fact that a law uses the loss of a business license as its sanction for violations does not make it a licensing law, within any common-sense understanding of those words.

Particularly when the statutory term “licensing and similar laws” is considered, as it must be, in the context of the complex system of employer sanctions as a whole that Congress enacted through the IRCA, *Pilot Life*, 481 U.S. at 51, and in light of the Supreme Court’s refusal “to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law,” *Locke*, 529 U.S. at 106 – as it would here – it is simply impossible to conclude that Congress intended local regulation of the employment of undocumented immigrants of the kind Hazleton has enacted to survive the express preemption that Congress wrote into the IRCA. To conclude otherwise would not only flaunt any common-sense reading of the words Congress wrote, but would – particularly if Hazleton’s attempt to write its own immigration laws is widely imitated (as already appears to be the case) – undermine the balance Congress chose to strike among competing policy concerns in adopting the IRCA’s regime of employer sanctions.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amicus Curiae* Change to Win complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief is in Times New Roman 14-point typeface. With the exception of those portions excluded under Fed. R. App. P. 32(a)(7)(B)(iii), it contains 4,436 words.

I further certify that the text of the electronic version of this brief filed with the Court is identical to the text of the paper copies. The electronic brief was scanned with the Symantec virus detection program, and no virus was detected.

 /s/ John M. West
John M. West

CERTIFICATE OF BAR MEMBERSHIP

I, John M. West, hereby certify that I am a member in good standing of the bar of this Court.

 /s/ John M. West
John M. West

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of *Amicus Curiae* Change to Win was filed electronically, and that paper copies were dispatched to the Clerk and served on counsel for appellant and appellees at the following addresses by third-party commercial carrier for delivery within three calendar days, this 17th day of April, 2008:

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