# ARTICLE

# STATE EMPLOYMENT AUTHORIZATION

AHILAN T. ARULANANTHAM AND ASTGHIK HAIRAPETIAN*

ABSTRACT

*Can state governments hire undocumented workers? That question has risen to prominence in the last few years, as the prospects of federal legislation to grant lawful status to the approximately 11 million undocumented people living in the United States have dimmed. The issue has gained particular urgency in the context of higher education. More than one million undocumented people came to the United States when they were children, and many of them received temporary protection from deportation and authorization to work through the Deferred Action for Childhood Arrivals (DACA) program. But a combination of political and legal forces have effectively closed DACA to new applicants for most of the last five years. As a result, nearly all undocumented students graduating high school today have no access to DACA, and therefore no ability to accept employment opportunities on college campuses—even when it is necessary to complete their studies.*

*In the absence of federal legislation or further administrative action in this area, building immigrant-inclusive communities has increasingly become the task of states rather than the federal government. California has made great strides in that area over the past two decades by providing health insurance, driver's licenses, and various other opportunities to state residents, regardless of immigration status. Until now, however, California has stopped short of protecting the ability of undocumented*

---

* The authors would like to thank Hiroshi Motomura, Adam Cox, Pratheepan Gulasekaram, Jennifer Chacon, Jennifer Gordon, Omar Jadwat, Tom Jawetz, Michael Kagan, Peter Markowitz, Isabel Medina, Victor Narro, Shoba Sivaprasad Wadhia, Michael Wishnie, and Stephen Yale-Loehr for their invaluable contributions to the ideas described here. Special thanks to Valerie Marquez, Genesis Aguirre, Elizabeth Bird, and Viviana Gonzalez for their research assistance. 

*people to work. Most policymakers have assumed that any state policy permitting undocumented people to work would violate federal law.*

*But that assumption is wrong. While Congress prohibited employers from knowingly hiring undocumented workers in the Immigration Reform and Control Act of 1986 (IRCA), the federal prohibition against employing undocumented people does not specify that it applies to* ***state government employers****. That omission is crucial, because Congress must speak clearly when it seeks to intrude upon areas of traditional state authority—such as whom states may hire as their own employees. As a result, federal law* ***already*** *permits states to hire undocumented people.*

*In this article, we set forth in detail the argument for reading the federal prohibition on hiring undocumented people not to apply to state government employers. We first describe the textual evidence that states are not included in the federal prohibition. We then explain why reading the prohibition to apply to states would infringe upon the states' historic powers, and therefore cannot be accomplished without a clear statement. We go on to address questions raised by our argument. We show that many state institutions—including public universities like the University of California—already have authority to hire undocumented people as employees. We also describe the need for more research to determine the full implications of the argument we describe.*

TABLE OF CONTENTS

## INTRODUCTION

Nearly forty years have passed since Congress enacted—and President Ronald Reagan signed—the last large-scale legalization program for undocumented immigrants.[1] Demographers estimate there are now approximately 11 million undocumented people living in the United States.[2] As of 2017, more than two thirds of them had lived here for more than a decade, and more than one million of them came here when they were children.[3]

However, despite massive political mobilization at various times over the last twenty years, political support for legalization in both houses of Congress and the White House at the same time has never been sufficient to enact a new legalization measure.

Some observers thought that would change after the 2020 election. President Biden was elected after endorsing broad "immigration reform"—code for legalization—on the campaign trail, and Democrats won control of

1. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (1986).
2. *Profile of the Unauthorized Population: United States*, MIGRATION POL'Y INST. (2019), https://perma.cc/2EQN-9FVV.
3. *See Key facts about the changing U.S. unauthorized immigrant population*, PEW RSCH. CTR. (Apr. 13, 2021), https://perma.cc/C8PU-NS9D.

both houses of Congress.[4] Moreover, the pandemic produced a wave of sympathy for "essential workers," many of whom were undocumented, because they risked their lives to work in-person while many others sheltered. Even after most people returned to more normal work routines, the pandemic left the country with a massive labor shortage: by 2023, according to one estimate, "Even if every unemployed worker were to fill an open job within their respective industry, there would still be millions of unfilled job positions, highlighting the widespread labor shortage."[5]

One might have thought these conditions would surely produce enough support, if not complete bipartisan consensus, for measures to allow 11 million people who had already lived here for years to fully enter the workforce rather than continue to work, if at all, only "under the table." But that did not come to pass. President Biden proposed both a substantial legalization measure and a more targeted one focusing on discrete groups of immigrants, but neither measure received a vote in the Senate.[6]

In the face of similar congressional inaction a decade earlier, the Obama Administration took an important step to allow a significant portion of the undocumented population to obtain temporary protection from deportation and authorization to work by creating the Deferred Action for Childhood Arrivals (DACA) program.[7] Roughly 800,000 people who came to this country at a young age and met certain other qualifications have benefited from it.[8] However, a combination of political and legal forces have worked to prevent the expansion of DACA, such that the program has been effectively closed off to new applicants for most of the last five years. Perhaps most importantly, because DACA requires individuals to have been physically present in the United States on June 15, 2007, in order to qualify, DACA is almost entirely unavailable to today's undocumented youth.[9] By next year, no one graduating from high school at age 17 will qualify for DACA.

The implications of that shift have been profound, particularly in the context of higher education. Every year 27,000 undocumented students graduate from high school in California alone—many with dreams of pursuing higher education.[10] For years, public universities across the nation have opened their doors to such students, promising them access to higher education,

---

4. *See* Mimi Dwyer, *Factbox: U.S. president-elect Biden pledged to change immigration. Here's how,* REUTERS (Jan. 15, 2021), https://perma.cc/Z3WY-LVP2.

5. Stephanie Ferguson & Makinizi Hoover, *Understanding America's Labor Shortage: The Most Impacted Industries*, U.S. CHAMBER OF COM. (Feb. 13, 2004), https://perma.cc/K4DK-JHYP.

6. *See Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*, WHITE HOUSE (Jan. 20, 2021), https://perma.cc/DMZ8-XGLX; *Statement by President Joe Biden on DACA and Legislation for Dreamers*, WHITE HOUSE (July 17, 2021), https://perma.cc/2FGJ-LXX2.

7. *See* Memorandum from Janet Napolitano, Secretary, DHS, to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot.(CBP), et al. (June 15, 2012), https://perma.cc/389M-LPAQ.

8. Jens Manuel Krogstad, *DACA has shielded nearly 790,000 young unauthorized immigrants from deportation*, PEW RESEARCH CENTER (Sept. 1, 2017), https://perma.cc/4UU3-9G45.

9. *See* Memorandum from Janet Napolitano, *supra* note 7.

10. *California,* HIGHER ED IMMIGR. PORTAL, https://perma.cc/8L9M-G76K.

along with all the expanded life opportunities it offers. But for most of the last five years, undocumented students have not been able to qualify for DACA and have remained unable to accept most employment opportunities on campus—because without DACA they cannot obtain federal work authorization. As a result, they face significant additional barriers in paying for school. And even the students that somehow manage to navigate that financial barrier find that many other doors—particularly in the context of graduate school—are closed to them. Even when these students receive the highest grades among their peers, they still cannot accept work as research assistants, medical residents, teachers-in-training, and similar positions that are functional prerequisites to completing their degrees.

In the absence of federal legislation or further administrative action in this area, state and local governments have acted to fill the void to the extent they can. In the last twenty years, various measures designed to foster immigration inclusion have proliferated at the state and local levels. California, home to one in every four immigrants (and one in every eight people) in the country, has been particularly active. Among other measures, it has expanded educational opportunities to undocumented students by permitting them to qualify for in-state tuition rates,[11] made driver's licenses available to undocumented people,[12] restricted its law enforcement officers from cooperating with federal immigration enforcement,[13] and made income-based health insurance available to all, irrespective of immigration status.[14] California has also brought undocumented workers within the protection of its various worker protection statutes,[15] including its minimum wage and disability laws, and permitted undocumented immigrants to obtain professional licenses, including law licenses.[16] Many other states have adopted some or all of these measures.

Notably absent from that long list, however, is any provision permitting undocumented people to work. No state has attempted to affirmatively authorize the employment of undocumented people. This is perhaps unsurprising. The same law that enacted the last large-scale legalization nearly forty years ago—the Immigration Reform and Control Act of 1986 (IRCA)—also created the federal government's first general prohibition on the employment of undocumented people. Since its passage, legislators and academics alike have

---

11. *See* CAL. EDUC. CODE § 68130.5; CAL. CODE REGS. tit. 5 § 54045.5; *see also In-State Tuition*, IMMIGRANTS RISING, https://perma.cc/G7RY-MACU.

12. *See* CAL. VEH. CODE § 12801.9; *see also AB60 Driver's License*, CAL. DEP'T OF MOTOR VEHICLES, https://perma.cc/22ND-HSJA.

13. *See* CAL. GOV'T CODE § 7282.5; *see also California Laws Protecting Immigrants' Civil Rights*, CALIFORNIA DEP'T OF JUST., OFF. OF THE ATT'Y GEN., https://perma.cc/4SKQ-KPB2.

14. *See* CAL. WELF. & INST. CODE § 14007.8; Kristen Hwang, *California expands health insurance to all eligible undocumented adults*, CAL MATTERS (Dec. 28, 2023), https://perma.cc/D97N-UUK4.

15. *See* CAL. CODE REGS. tit. 2 § 11028(f)(1).

16. *See* In re Garcia, 315 P.3d 117, 120 (Cal. 2014); *see also*, *e.g.*, CAL. BUS. & PROF. CODE §§ 30, 2103, 6533.

assumed that IRCA prohibited states from enacting their own employment authorization regimes.

But that understanding now appears to be changing. In the fall of 2022, we and other legal scholars presented an early version of a previously unknown interpretation of IRCA in a memo that challenges long-held assumptions about IRCA's scope.[17] On that theory, IRCA bars private employers from hiring undocumented people, but does not apply to *state governments* when they act as employers. Based on that understanding, a group of undocumented students, professors, and other advocates began a campaign—known as Opportunity for All—to persuade the University of California ("UC") to open educational employment opportunities to all students regardless of immigration status. The campaign garnered significant media attention and secured a significant victory in May 2023, when the UC Board of Regents voted unanimously to develop a plan to implement the program.[18] But eight months later the Regents reversed course, voting in January 2024 to suspend those plans for one year, apparently under pressure from the Biden Administration (and perhaps also California Governor Gavin Newsom).[19] As of this writing, it appears the UC will reconsider the issue in January 2025. A month later, in yet another twist, California State Assemblymember David Alvarez introduced legislation that would require the University of California, as well other institutions of higher education in the state, to open educational employment opportunities to all students regardless of immigration status. That legislation passed the California State Assembly and Senate by overwhelming margins, but was vetoed by Governor Newsom on September 22, 2024. His veto message strongly suggested that the interpretation of IRCA underlying the legislation should be tested in court.[20]

This article proceeds in three parts. Part I describes the argument that IRCA did not bind the states. It contains two sub-parts common to virtually all modern statutory interpretation: analysis of the plain text and review of background interpretive principles that place something akin to a thumb on the scale—here, in favor of requiring a clear statement from Congress. Part I. A analyzes IRCA's text to assess whether Congress did express a clear intention to bind the instruments of state government. It did not. A detailed analysis of IRCA's plain text shows both that its prohibition on employing undocumented people does not explicitly apply to states, and that no other textual signals in the statute definitively illustrate any congressional intent to

17. Letter from Scholars Regarding Proposal for University of California to Hire Undocumented Students for Positions within Univ. of Cal. (Sept. 7, 2022), https://perma.cc/QH66-RN6W.

18. *See* Miriam Jordan, *Students, Legal Scholars Push California Universities to Hire Undocumented Students*, N.Y. TIMES (Oct. 19, 2022), https://perma.cc/WWM4-RW7W; Teresa Watanabe, *UC regents take groundbreaking step toward hiring immigrant students without legal status*, L.A. TIMES (May 18, 2023), https://perma.cc/7FPM-X76M.

19. *See* Blake Jones, *Biden officials privately resisted University of California plans to hire undocumented students*, POLITICO (Jan. 24, 2024, 5:01 AM), https://perma.cc/D2EF-EDYC.

20. *See Assemblymember David Alvarez Introduces Assembly Bill 2586 to Open Employment Opportunities to Undocumented Students on UC, CSU and Community College Campuses*, Assemblymember David Alvarez (Feb. 15, 2024), https://perma.cc/R4QP-BCCJ; AB 2586 Veto Message, Off. of the Governor (Sept. 22, 2024), https://perma.cc/S5LS-L842.

do so. Comparing IRCA to various other statutes that do explicitly bind States further illustrates what the plain text shows, as it makes clear that Congress knows how to use such language when it wishes to do so.

Part I.B then assesses the relevant interpretive principles, and in particular the rule that Congress would have had to speak clearly to dictate to state governments whom they can and cannot hire. A longstanding body of Supreme Court jurisprudence establishes that Congress must speak clearly where it seeks to alter the traditional balance of powers between the federal government and the states. Absent explicit language, courts will not read federal statutes to regulate instrumentalities of state government if doing so would alter that traditional balance of powers.

Applying that interpretive rule in this context makes good sense, as reading IRCA to limit states' ability to dictate the qualifications for all their employees—even very high-level ones—would unquestionably diminish the traditional powers of the states, and likely raise serious constitutional problems as to at least some types of state employment. While those constitutional problems are not present as to all state employment positions, including no doubt many student jobs on campuses, they are present in a significant number of cases, thus requiring courts to read the statute to avoid the associated constitutional problems if possible.

Part II considers questions raised by our argument, in two parts. Part II.A considers questions related to IRCA itself. First, while the statute may not clearly cover instrumentalities of state government, the regulations have long had far clearer language. Shouldn't the courts give deference to the agency's interpretation in this context? Second, IRCA makes it a crime to knowingly hire unauthorized workers and imposes civil sanctions on such activity. Do state employers face the daunting prospect of criminal and civil liability if they adopt the approach we advance here? And third, given federal supremacy over the immigration realm, why do the federalism-related interpretive tools described in Part I apply at all in this context?

Part II.B considers the possibility that other federal statutes may prohibit the hiring of undocumented people, even if IRCA itself does not. While other federal statutes and regulations bear on questions related to the employment of undocumented individuals—such as professional licensing and limitations on employment for non-immigrants—no other law prohibits the University or other branches of California state government from employing undocumented people. Part II ultimately concludes that none of the questions raised by the new interpretation of IRCA can carry the day in the face of the statute's plain text and the serious constitutional problems to which the objectors' reading gives rise.

Part III discusses significant changes in the immigration policy landscape that could arise from widespread adoption of this new interpretation of IRCA. We use the State of California, where the state government is comprised of some very large institutional employers (including the University of California), as an exemplar to illustrate the kinds of state statutes that could

facilitate the employment of undocumented people, or, instead, separately prohibit such employment. Part III then addresses the role of local governments. Interestingly, under our interpretation of IRCA, some local governments could also hire undocumented people because they exercise the authority of states.

## I. DOES IRCA BIND THE STATES? TEXT, STRUCTURE, FEDERALISM

The argument that IRCA does not bind the states contains two elements, each of which are essential to most modern statutory interpretation. The first, discussed in Part I.A, involves a close reading of the statute's plain text along with related textualist principles of statutory construction. The second, discussed in Part I.B, considers substantive interpretive principles that courts typically apply after textual analysis concludes.

### A. *Applying Textualist Principles of Statutory Construction, IRCA Likely Does Not Bind Instruments of State Government*

The Supreme Court has instructed that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."[21] As such, any analysis of the question of whether IRCA binds the states should begin (and perhaps also end) with its plain text. The plain text of the relevant provisions strongly suggests State governments are not included in IRCA's prohibitions.

#### 1. *IRCA's Prohibition Does Not Mention States*

The strongest argument in favor of our view follows from the text in remarkably straightforward terms. 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 unauthorized individual ("IRCA's prohibition").[22] A "person" is either an individual,[23] or an organization defined as "an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects."[24] The statute does not define "entity" as such;[25] however, a 1996 amendment to IRCA enacted in the

---

21. Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 461–62 (2002) (quotations omitted). We recognize this maxim is often honored in the breach. *See* Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93, 101 n.28, 110–29 (1995).

22. 8 U.S.C. § 1324a(a)(1).

23. 8 U.S.C. § 1101(b)(3).

24. 8 U.S.C. § 1101(a)(28). The definitions for "person" and "organization" were included in the original version of the 1952 Immigration and Nationality Act ("INA") and have not been changed since. *Immigration and Nationality Act*, Pub. L. 414, 66 Stat. 163, 170, secs. 101(a)(28), 101(b)(3) (June 27, 1952).

25. In contrast to the statute, the regulations define "entity" as "any legal entity, including but not limited to, a corporation, partnership, joint venture, *governmental body*, agency, proprietorship, or association." 8 C.F.R. 274a.1(b) (emphasis added). We discuss the regulation in detail infra, Part II.A.

Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA") specifies that an "entity" "includes an entity in any branch of the Federal Government."[26]

To summarize, the original statute provided that persons and various entities are covered by its provisions, but did not mention governments. Congress then amended it to specify that "entity" includes the federal government. There would have been no reason to enact that amendment if "entity" already clearly included governments. Yet the amendment still did not include states. Therefore, "entity" does not include states and they are not bound by the prohibition on hiring undocumented people.[27]

One other aspect of this initial textual analysis bears mention. A separate provision of IIRIRA, the 1996 statute that specified that the term "entity" includes the "Federal Government" (without mentioning states), added another section to the immigration code, which provides that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[28] That provision demonstrates that the Congress that amended IRCA to specifically bind the federal government had the ability to specifically bind state and local entities, and did so in other parts of the statute. Its failure to do so in the section defining the scope of IRCA's prohibition against hiring unauthorized individuals provides strong evidence that states are not included in its definition of "entity."[29]

The argument set forth above applies the well-known *expressio unius est exclusio alterius* canon of statutory interpretation: "the expression of one

---

26. 8 U.S.C. § 1324a(a)(7). *See* Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. 104–208, 110 Stat. 3009–668, sec. 412 (Sept. 30, 1996).

27. One author has argued that when Congress passed IRCA there would have been no need for it to specify that states could not hire undocumented people, because the only laws on the subject that states were enacting in that era were *restricting* such hiring (even by private actors). *See* George Fishman, *California Dreamin' : Can State Universities Legally Hire Non-Work Authorized Aliens*, 48 J. COLLEGE & UNIV. L. 95, 112 (2023). Even if true, that would not explain the glaring omission of states, particularly since states were specifically mentioned in the 1996 amendments prohibiting "Federal, State, or local law [s]" from sharing information with the INS. 8 U.S.C. § 1373(a). Similarly unavailing is the argument that Congress mentioned the "Federal Government" in § 1324a(a)(7) only to require it to participate in one of the otherwise-voluntary employment verification programs (later known as E-Verify). That interpretation would render § 1324a(a)(7) entirely meaningless, because other provisions of the 1996 amendments explicitly require "Each Department of the Federal Government" to participate in employment verification. 8 U.S.C. § 1324a note (Pilot Programs for Employment Eligibility Confirmation). Moreover, even if this were the only reason for the addition, it would still suggest that in 1996 Congress was legislating against a backdrop of ambiguity as to whether the prohibition applies to governments at all—precisely the position we advance here. Finally, we note that the individual raising these objections is a fellow at the Center for Immigration Studies, which has been classified as a hate group by the Southern Poverty Law Center because its authors' consistent opposition to all immigration is motivated by an ideology of white supremacy. *See Hate Groups Like Center for Immigration Studies Want You To Believe They're Mainstream*, SOUTHERN POVERTY LAW CTR. (Mar. 23, 2017), https://perma.cc/JPU6-ZDYS.

28. Communication between government agencies and the Immigration Naturalization Service, 8 U.S.C. § 1373(a).

29. *See id.* § 1324a(a)(1).

thing is the exclusion of others."[30] Of course courts do not always adhere to it, but the canon is properly applied "when the result to which its application leads is itself logical and sensible,"[31] and "when in the natural association of ideas in the mind of the reader [there is] strong contrast" between the terms the statute includes and those it omits.[32]

IRCA appears to provide a particularly natural context in which to apply the canon. Not only do IRCA's definitions of "person" and "entity" fail to mention state governments, but the statute manifests a "strong contrast,"[33] between federal and state governments by including only the former in some places while referencing both in the latter. In doing so, IRCA's definitions invoke an "association of ideas" that is "natural" for people familiar with our federal system, which routinely creates one set of rules for state and local government entities and a different set for the federal government.[34] Thus, it is "logical and sensible,"[35] that state governments would be excluded.[36]

### 2. *References to States in Other Sections of IRCA Support the Reading that IRCA Does Not Bind States*

While many strict textualists might be inclined to stop there,[37] in the interests of completeness we believe it useful to look to the rest of the statute,

---

30. Springer v. Gov't of Philippine Islands, 277 U.S. 189, 206 (1928).

31. Ariz. State Dep't of Pub. Welfare v. Dep't of Health, Educ. & Welfare, 449 F.2d 456, 472 (9th Cir. 1971).

32. Ford v. United States, 273 U.S. 593, 611 (1927).

33. *Ford*, 273 U.S. at 611.

34. *Compare*, *e.g.*, 42 U.S.C. 1983 (providing a remedy for individuals whose Constitutional rights are violated by state agents) *with* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 427 (1971) (Black, J., dissenting) (noting "Congress has created such a federal cause of action against state officials. . . [but] it has never created such a cause of action against federal officials").

35. *Ariz. State Dep't of Pub. Welfare,* 449 F.2d at 472.

36. Before we leave our discussion of the plain text of the governing provision, we should address an issue arising from the legislative history. While most (and perhaps all) textualists would deem resort to legislative history unwarranted in the face of a textual inference as strong as the one described here, one critic of our view has pointed to the Senate Report for IRCA, which stated that the prohibition on hiring undocumented workers is intended to cover "all employers . . . private and public." *See* Fishman, *supra* note 26 at 111 (quoting S. Rep. 99–132 at 32 (1985)). We believe this phrase insufficient to overcome the statute's plain text for several reasons. Most obviously, we have found no comparable language in the House Report or Conference Committee statement. *See* H.R. Conf. Rep. No. 99-1000 (1986); H.R. Rep. No. 99-682. Even if this passing phrase in the Senate Report could otherwise bear the weight ascribed to it, its omission from other reports suggests there was not agreement on this point in the House, or in the Conference Committee that ultimately sent IRCA to the President's desk. Beyond that, the line appears as a passing description, rather than as part of a discussion as to whether it would be appropriate for the federal government to dictate state government hiring policies. That passing reference does not suggest that Congress engaged in considered deliberation as to whether or not to displace state authority in this area. Indeed, the term "public" in the report could well refer just to the federal government, which in turn would explain why Congress sought to clarify that issue in the 1996 amendments. As we discuss in Part I. B, the Supreme Court has established that "[l]egislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to" authorize suits against states in federal court, *Dellmuth v. Muth*, 491 U. S. 223, 230 (1989), and it has extended that same principle of construction to legislative attempts to "pre-empt the historic powers of the States" more generally. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989).

37. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("[The] inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'") (quoting United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240 (1989)).

including the provisions that do not concern the prohibition on hiring undocumented people, for further evidence of Congress's intent. Section 1324a contains other provisions relating to the prohibition on hiring undocumented people, and IRCA also contains two sections in addition to 1324a. Section 1324b prohibits discrimination against people authorized to work who are not citizens, and Section 1324c establishes penalties for document fraud related to IRCA's documentation requirements. If a provision in one of these sections makes very clear that it must apply to States, then perhaps one could presume that all of IRCA applies to states, notwithstanding the textual evidence described above.

However, a search of references to states in these other sections does not undermine the strong inference arising from the provisions establishing the prohibition in 1324a itself.[38] Section 1324a's other provisions make a few references to states that tell us little, but on balance provide more support for the view that the prohibition against hiring unauthorized individuals does not apply to states. First, *if* a state employment agency uses IRCA's employment eligibility verification system, then a referral by a state employment agency can satisfy the statute's employment-verification requirements.[39] That provision strongly suggests compliance by state employment agencies is not mandatory, which the regulations confirm: a state agency "may, but is not required to, verify identity and employment eligibility."[40] Of course, that a state's employment *agency* may choose not to verify eligibility does not necessarily mean that the state is exempt from IRCA's prohibition when acting as an *employer*. Nonetheless, if Congress had wanted entirely uniform compliance across all sectors, one would have expected it to require state employment agencies to help enforce IRCA's requirements by limiting their assistance to eligible workers.

Second, three other provisions of Section 1324a mention states in ways that show the enacting Congress knew how to dictate what states could and could not do when it sought to do so. Section 1324a(h)(2) "preempt[s] any State or local law imposing civil or criminal sanctions . . . upon those who employ" unauthorized individuals. Thus, the statute tells states what they may not do, i.e. impose sanctions on employers for violating the statute, but not that they are prohibited from hiring unauthorized individuals. In addition,

---

38. IRCA only defines "State" in relation to its "State Legalization Impact-Assistance Grants" and "State Assistance for Incarceration Costs of Illegal Aliens and Certain Cuban Nationals." Immigration Reform and Control Act of 1986, Pub. L. 99-603, sec. 204(j), 100 Stat. 3359, 3410 (Nov. 6, 1986); *id*. at 3444, sec. 501(e). These sections refer to a preexisting provision under the Immigration and Nationality Act, which provides that: "State. . .includes the District of Columbia, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands." 8 U.S.C. § 1101 (a)(36).

"Person" is defined differently in 8 U.S.C. § 1322(d) than the rest of IRCA: it "means the owner, master, agent, commanding officer, charterer, or consignee of any vessel or aircraft." This definition does not change the prior analysis.

39. 8 U.S.C. § 1324a(a)(5).

40. *See* 8 C.F.R. 6 274a.6(a).

IRCA permits alternative forms of identification in the case of a state that does not provide identification documents other than driver's licenses.[41] And the President "shall examine the suitability of existing Federal and State identification systems" for evaluating the security of the employment verification system.[42] These three provisions do not appear to cut in either direction—they are consistent with a world in which states are bound, and with a world in which they are not. They are arguably relevant only insofar as they make clear that Congress knew how to bind states explicitly when it first enacted IRCA in 1986. But, again, these references are hardly dispositive, particularly given that they do not occur in the primary operative provision.

Looking farther afield to other sections of IRCA also does nothing to dispel the strong inference drawn from its controlling provisions that states are not bound by IRCA's prohibition. Section 1324b provides a private cause of action against a "person" or "other entity" for discriminating against authorized workers based on citizenship status.[43] One provision of that section does reference states: there is an exception to the non-discrimination rule for "discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government."[44] On its face, that provision may support our view, insofar as it appears to permit state contractors and certain other employers to discriminate on the basis of citizenship status under certain conditions—when "required by . . . State . . . government contract"—but does *not* explicitly permit state governments to do the same.[45] Thus, if "person" or "other entity" included states, this provision would produce the confounding result that states cannot engage in discrimination required by their contracts, while contractors and other types of employers can. But this interpretive dilemma, proponents might say, disappears if IRCA's prohibition on hiring undocumented people does not apply to states. If that is so, then its failure to provide an exception for state employment makes perfect sense.

But that inference is not the only one that could be drawn from this provision. An opponent of the theory that IRCA does not bind the states might respond that the exception for discrimination "otherwise required in order to comply with law, regulation, or executive order"[46] refers implicitly to all law, including *state* as well as federal law, and therefore would protect discriminatory state hiring to the same extent that it protects discriminatory hiring by

41. 8 U.S.C. § 1324a(b)(1)(D)(ii).
42. *Id.* § 1324a(d)(1)(A).
43. 8 U.S.C. § 1324b(a)(1). We will assume for present purposes that those terms, as well as the word "State," have the same meaning in all of IRCA's sections.
44. *Id.* § 1324b(a)(2)(C).
45. *Id.*
46. *Id.*

state contractors. On that view, IRCA generally applies to states, but the exception to its non-discrimination rules creates a carve-out that permits states to restrict certain jobs to citizens where their law requires such restrictions.

There is some support for the skeptic's view of this provision in the legislative history.[47] In response to a question about the exception for discrimination required to comply with law, the primary sponsor of what became Section 1324b, Representative Barnett (Barney) Frank of Massachusetts, stated "[w]hat we are talking about is that there may be requirements of citizenship in state laws or elsewhere. . . where there are existing State statutes that have been constitutionally upheld that require that you be a citizen for certain jobs. . . this is not meant as a preemption. That is a requirement for certain law enforcement jobs."[48] Representative Frank's comment would make no sense if IRCA's non-discrimination rules did not apply to states in the first place.

However, as is so often the case with legislative history, another historical source suggests the opposite. The 1986 Report of the House Judiciary Committee included a report from the Department of Justice, which summarized the exception as follows: "All employers are subject to this anti-discrimination provision, except [if]. . . United States citizenship is required by *Federal* law, regulation, or executive order, a Federal, State or local-government contract, or by order of the Attorney General."[49] That view also appears consistent with another aspect of the text on this point. The words "Federal, State, or local" appear in Section 1324b's clause about contracts, but not its clause about laws, regulations, and executive orders, which suggests that the latter encompasses only federal law, rather than *all* (i.e., "Federal, State, and local") laws, regulations, or executive orders.

While ultimately the record appears mixed on whether legislators understood the first clause to refer only to federal laws, regulations, and executive orders, or also to state laws, the Supreme Court has expressed the general principle that the statement of a single legislator cannot alter the otherwise-clear meaning of a statute's text: "We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text."[50] The ambiguity of the

---

47. We discuss an argument based on the legislative history of the 1996 amendment to IRCA's core prohibition in Part II.B.

48. 98 CONG. REC. 15938 (June 12, 1984).

49. Immigration Control and Legalization Amendments Act of 1986, Report of the House Committee on the Judiciary on H.R. 3810, H.R. Rep. No. 99-682 pt. I, at 108 (July 16, 1986) (emphasis added). To the extent one believes in consulting legislative history, committee reports are generally thought to be among the more authoritative sources. *See Digit Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 782 (2018) (Sotomayor, J., concurring).

50. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 457 (2002). The statements of House Representative Dan Lungren of California are illustrative of the rationale for the Supreme Court's rule on this point. In different statements occurring just a page apart in the Congressional Record, Representative Lungren used language suggesting *both* that the non-discrimination exemption applied only to federal laws *and* that it applied to federal and state laws. *Compare* H.R. Rep. No. 99-682, 215, 1986 U.S.C.C.A.N. 5649, 5751 (noting "claims of national-origin discrimination are barred if . . . United States citizenship is

various competing statements related to this provision provides ample justification for applying that rule here. On balance, nothing in Section 1324b's provisions referencing states shows that states are bound by IRCA's prohibitions—whether against discrimination or against hiring unauthorized workers.

There are numerous other references to states across IRCA's seven titles and nearly forty individual sections. The statute requires Congress to reimburse state and local governments for certain immigration-related expenses (including both enforcement and benefits costs),[51] dictates how states are to verify benefits eligibility for certain non-citizens,[52] and in various other ways touches upon the states. These provisions support our view insofar as they show that the Congress that enacted IRCA knew very well how to specify that its provisions applied to states when it sought to do so. But beyond that, they tell us little; their various rules make sense whether or not IRCA's prohibition on hiring undocumented people applies to states as employers.

Finally, although it was not enacted as part of IRCA, it arguably warrants mention that the word "State" also appears in Section 1324c. This section establishes penalties for fraud related to the document requirements created in IRCA, although those amendments were made in 1990. A textualist unhappy about our focus on provisions in IRCA that do not concern its prohibition on hiring undocumented workers would be doubly displeased about any review of provisions that were not even enacted as part of IRCA or amendments to it. Nonetheless, a provision in Section 1324c warrants some discussion because it provides perhaps the best textual evidence *against* our view. Section 1324c(a) and (b) create penalties for "any person or entity" that knowingly forges documents, or accepts or receives forged documents, for the purposes of satisfying verification requirements in IRCA, but "does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States."[53] If IRCA does not apply to states to begin with (the argument goes), then this exception for state law enforcement should be unnecessary. Thus, this provision suggests that when Congress added these provisions in 1990, it believed states were *not* excluded from IRCA's definition of "person" or "entity."

However, there are other possible conclusions to draw from the reference to state law enforcement in Section 1324c. One might instead conclude that the carve-out for state law enforcement might function to protect private employers who are playing some role in an investigation conducted by State law enforcement. For example, during a state law enforcement agency

---

required by Federal law, regulation, or executive order"), with *id*. at 216 ("the bill appears to recognize that there are some federal or state laws which legitimately limit some employment opportunities to citizens.").

51. *See* 8 U.S.C. § 1101; 42 U.S.C. § 603; 42 U.S.C. § 1396b; 42 U.S.C. § 502.

52. *See* 8 U.S.C. § 1320b-7(a).

53. 8 U.S.C. § 1324c(a)-(b).

operation, state officials might ask a private actor to continue providing forged documents in order to help the state discover the leaders of a human trafficking operation. In such circumstances, the state could not immunize the private actor's provision of forged documents—even if the state itself is not bound by the prohibitions in 8 U.S.C. 1324c—absent the exception for "lawfully authorized investigative, protective, or intelligence activity," 8 U.S.C. 1324a(c). Thus, the exception could serve an important function whether or not IRCA's prohibition applies to state governments, as it is broad enough to allow the state to immunize this kind of activity by a private actor.

In short, nothing in the other sections of 1324—either the non-discrimination provisions of 1324b or the document fraud provisions of 1324c—provides an inference strong enough to counter the plain text of the core provisions at issue here.

### 3. *Other Statutes That Do Bind States Suggest IRCA Does Not Apply to States*

Finally with respect to IRCA's plain text, we point to several statutes that unquestionably *do* bind state governments, because those laws contain clear, unambiguous terms to that effect. These statutes—many of which were amended to explicitly include states in the 1970's, only shortly before IRCA—again make plain that Congress knew how to regulate state entities directly, and therefore provide further support for the view that IRCA does not apply to states because it did not use the language that Congress repeatedly used when it sought to regulate state entities. While the existence of one or even two such statutes would not be extremely persuasive, given that there is no "canon of interpretation that forbids interpreting different words used in different parts of the statute to mean roughly the same thing,"[54] here we find a consistent pattern across six statutes in a variety of contexts where Congress uses explicit language to bind the states, and *none* where courts have read general language like that used in IRCA to govern states.

The history of the provisions governing states in Title VII of the Civil Rights Act of 1964 ("Title VII") is instructive. Today, Title VII explicitly includes states in its definition of employer, and thus has been read to cover states. But Title VII initially defined "person," which is used in the definition of "employer," as follows: "the term 'person' includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers."[55] It excluded "the

54. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 540 (2013); *see also W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.")

55. Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(a), 78 Stat. 241, 253 (1964).

United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof."[56]

In 1972, when Congress sought to cover states, it did not simply modify the exclusion provision to eliminate its reference to "a State or political subdivision thereof," but instead amended the definition of "person" to include "governments, governmental agencies, [and] political subdivisions," and also amended the definition of "employee" to include "employees subject to the civil service laws of a State government, governmental agency or political subdivision."[57] These amendments "br[ought] the States within [Title VII's] purview."[58]

A comparison of IRCA's definitional provisions to Title VII's supports our reading. When Congress sought to amend Title VII's provision excluding states, it did not simply eliminate it, but rather specifically included them by amending the statute's definitional provisions. Moreover, the current version of Title VII's definition of "person" does not distinguish between federal and state Governments, but rather "includes" governments generally, and specifies state employees are protected. In contrast, IRCA's definition of "entity" specifically "includes" only those within the "Federal Government."

Yet more support from analogous federal statutes comes from the Fair Labor Standards Act ("FLSA"), which also covers certain state entities because Congress explicitly mentioned them. Like Title VII, FLSA at first excluded states as employers, but was amended in 1966 to cover certain state hospitals and schools.[59] As the Supreme Court explained in *Employees v. Missouri*, "[b]y reason of the literal language of the present Act, Missouri and the departments joined as defendants are... covered by the Act."[60] The "statute specifically covered the state hospitals in question, and such coverage was unquestionably enforceable in Federal court by the United States."[61]

---

56. *Id*. § 701(b)(1).

57. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 2(1), (5), 86 Stat. 103 (1972).

58. Fitzpatrick v. Bitzer, 427 U.S. 445, 448–49 (1976) (finding Title VII abrogated state sovereign immunity).

59. *Compare* Fair Labor Standards Act of 1938, Pub. L. 718, sec. 3(d), 52 Stat. 1060 (June 28, 1938); *with* Fair Labor Standards Amendments of 1966, Pub. L. 89-601, sec. 102(b), 80 Stat. 831 (Sept. 23, 1966).

60. Emps. of Dep't of Pub. Health & Welfare, Missouri v. Dep't of Pub. Health & Welfare, Missouri, 411 U.S. 279, 283–85 (1973). The Court went on to analyze the separate question of whether Congress had abrogated the states' sovereign immunity with the change. Under longstanding doctrine, that a federal statute binds state governments does not mean that it also permits suit against state governments in federal court. In *Employees*, the Supreme Court found the amended language of FLSA insufficient to abrogate state sovereign immunity, even though it did plainly cover state governments. The Court stated that its decision did not render "the extension of coverage to state employees meaningless" because the federal government may still bring suit to enforce FLSA, as it is not constrained by the Eleventh Amendment's restriction on suits against states by others.

61. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 677 (1999) (discussing *Employees* and stating "[a]lthough the statute specifically covered the state hospitals in question, and such coverage was unquestionably enforceable in Federal court by the United States, we did not think that the statute expressed with clarity Congress's intention to supersede the States' immunity from suits brought by individuals.") (internal citations omitted); *see also Alden*, 527 U.S. at 732 (discussing *Employees* and stating it "recognized that the FLSA was binding upon Missouri but nevertheless upheld the State's immunity to a private suit to recover under that Act").

The Rehabilitation Act, a predecessor to the Americans With Disabilities Act, also supports our view of IRCA—and for similar reasons. Like Title VII and FLSA, the Rehabilitation Act also applies to states because Section 504 of the Act explicitly lists states and state entities as bound by its anti-discrimination prohibitions. It prohibits programs and activities which receive federal funding from discriminating based on disability and defines them to include "a department, agency, special purpose district, or other instrumentality of a State or of a local government,"[62] and "a college, university, or other postsecondary institution, or a public system of higher education,"[63] among others. Thus, the Rehabilitation Act explicitly applies to states, and states that receive funding under the Rehabilitation Act may be sued for violations of the Rehabilitation Act.[64] Again, IRCA's failure to mention states stands in stark contrast.

The Age Discrimination in Employment Act ("ADEA") also explicitly covers states. Like Title VII, ADEA initially excluded the states in its definitions, stating that "'employer'. . . does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof."[65] In a 1974 amendment, Congress explicitly added states to the definition of employer by defining the word "employer" as including "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States."[66]

The Individuals with Disabilities Education Act ("IDEA") provides still more proof that Congress knows how to explicitly bind states. The IDEA conditions federal school funding on states meeting certain requirements, such as providing a free appropriate public education and being subject to certain procedural safeguards.[67] In addition, after the Supreme Court held that the Education for All Handicapped Children Act ("EHA"), the IDEA's predecessor, did not clearly abrogate state sovereign immunity, Congress amended the statute to provide that states can be sued for violations despite

62. 29 U.S.C. § 794(a); 29 U.S.C. § 794(b)(1)(A).

63. *Id*. § 794(b)(2)(A).

64. *See* 42 U.S.C. § 2000d-7(a)(1) (stating states and their entities waive sovereign immunity to suit under the Rehabilitation Act if they accept federal funds.); Phiffer v. Columbia River Corr. Inst., 384 F.3d 791, 793 (9th Cir. 2004) (noting a state "waives Eleventh Amendment immunity by accepting federal funds" under section 504 of the Rehabilitation Act and may be sued); Douglas v. California Dep't of Youth Auth., 271 F.3d 812, 820 (9th Cir.), *amended*, 271 F.3d 910 (9th Cir. 2001) (stating California may be sued under the Rehabilitation Act because it accepts funds).

65. Age Discrimination in Employment Act of 1967, Pub. L. 90-202, § 11, 81 Stat. 601, 605 (1967).

66. 29 U.S.C. § 630. *See also* Act of April 8, 1974, Pub. L. 93-259, § 28, 88 Stat. 55, 74 (1974); *see also* Mount Lemmon Fire Dist. v. Guido, 139 S. Ct. 22, 23 (2018) ("In 1974, Congress amended the ADEA to cover state and local governments.").

67. 20 U.S.C. § 1412(a)(1), (6); *id*. 1412(h)(i)(2).

state sovereign immunity.[68] Again, unlike the IDEA, IRCA does not mention states as entities bound by its prohibition.

The Family and Medical Leave Act ("FMLA") provides yet another similar example of how Congress explicitly binds states when it chooses to do so. The FMLA defines "employer" to include "public agency,"[69] which means the "[g]overnment of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency."[70] The Supreme Court accordingly recognized that states are bound by the FMLA, a statute where the "clarity of Congress' intent. . .is not fairly debatable."[71] The same cannot be said of IRCA.

As this review of federal statutes in a diverse array of contexts shows, when Congress wants to govern states it clearly knows how to do so. It used explicit language to bind states in a variety of statutes passed in the years preceding IRCA's enactment. Because—unlike Title VII, the Rehabilitation Act, FLSA, IDEA, ADEA, and the FMLA—IRCA contains no language declaring that it binds states, it is best read simply not to apply to them.

* * *

To summarize Part I.A, the text of IRCA does not contain any statement that states are bound by IRCA's prohibition against hiring unauthorized individuals, even though it does explicitly cover the federal government and also mentions states in other provisions. Taken together, those textual signals strongly suggest that it does not bind states. While there are oblique inferences from other provisions of IRCA that could be drawn in either direction, ultimately, they do not provide clear evidence either for or against the inference that follows from the plain text of the controlling provision. That conclusion gains strength from a review of analogous federal statutes—all of which say explicitly that they cover states, using language noticeably absent from IRCA. In short, the plain text of IRCA's prohibition on hiring undocumented people is best read not to apply to state governments.

Some might conclude that no more work need be done, given that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."[72] Nonetheless, our argument does not

---

68. *See* 20 U.S.C. § 1403(a); Dellmuth v. Muth, 491 U.S. 223, 232 (1989). *See also* Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 280 n.31 (5th Cir. 2005) (Section 1403(a) "conditions a state's receipt of federal IDEA funds on its consent to suit under that Act."); *see also* Everett H v. Dry Creek Joint Elem. Sch. Dist., 5 F.Supp. 3d 1184, 1198 (E.D. Cal. 2014) ("It is uncontroverted, however, that states receiving federal funding under the IDEA waive sovereign immunity under 20 U.S.C. § 1403."), citing M.A. v. State-Operated Sch. Distr. Of the City of Newark, 344 F.3d 335, 346 (3rd Cir. 2003) ("One clear and unmistakable component of the IDEA is a state's waiver of Eleventh Amendment immunity").

69. 29 U.S.C. § 2611(4)(A).

70. 29 U.S.C. § 203(x).

71. Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 726 (2003).

72. *See* Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 461–62 (2002) (quotations omitted).

end there.[73] We also argue that Congress would have had to speak *clearly* to bind states, so that even if the textual argument were substantially weaker, our interpretation of IRCA would still carry the day. We turn to that issue in Part I.B.

### B. *Congress Would Have Had to Speak Clearly to Prohibit States from Hiring Undocumented People*

A court considering the question whether IRCA's prohibition on hiring undocumented people applies to the states would require a clear statement before concluding that Congress had dictated the states' employment policies. This is true for two closely-related reasons. *First*, if IRCA applies to the states, then it necessarily dictates the criteria that states must use when deciding whom to hire *into their own governments*. Any legislation accomplishing that result would likely affect the balance of power between national and state governments within the federal system, because the instruments of state government traditionally get to decide whom they hire. It would also raise serious Tenth Amendment problems in at least some contexts, as the states have exclusive constitutional authority to dictate the qualifications of at least some "high-level" state officers. *Second*, at bottom IRCA regulates employment, which is itself a traditional area of state control (even as to the private employment market), as the Supreme Court decided *in an immigration case* a decade before IRCA's passage. Both of these considerations strongly suggest that Congress would have had to speak clearly to bind State governments in IRCA, notwithstanding the fact that the statute involves federal immigration regulation.

#### 1. *IRCA Implicates the Clear Statement Rule for Federal Legislation Intruding Into Areas of Traditional State Control*

The Supreme Court has repeatedly held, in various contexts, that Congress may not regulate state governments in two areas relevant here, absent clear language to that effect. "[A] clear statement principle of statutory construction. . . applies when Congress intends to pre-empt the historic

---

73. A strict textualist might also note that the same argument we advance here as to states could also be made as to local governments. Largely the same textual analysis—that Congress mentioned the federal government but no other government—might lead one to conclude that Congress did not intend to bind local governments either. Bolstering that inference is the fact that in other provisions of IRCA, Congress did explicitly reference local authority. *See* 8 U.S.C. § 1324a(h)(2) (preempting "State or local law" imposing sanctions on the hiring of undocumented workers); *see also* 8 U.S.C. § 1324b(a)(2)(C). Similarly, when Congress has sought to regulate local governments, it has typically mentioned "local government" or "political subdivisions" of states. *See*, *e.g.*, 29 U.S.C. § 794(b)(1)(A) (the federal Rehabilitation Act, that prohibits disability discrimination by entities that receive federal funds, specifies that "[p]rogram or activity" includes "a department, agency, special purpose district, or other instrumentality of a State or of a local government,"); 29 U.S.C. 630 (ADEA, mentioning "political subdivision of a State"); 29 U.S.C. § 2611(4)(A) (FMLA, same); 29 U.S.C. § 203(x) (FLSA, same); 42 U.S.C. § 2000e(a) (Title VII, same). While a full discussion of how our interpretation of IRCA might apply to local governments is beyond the scope of this paper, we return to the question in Section III, *infra*.

powers of the States or when it legislates in traditionally sensitive areas that affect the federal balance."[74] For example, in 1985—the year before IRCA's enactment—the Supreme Court held in *Atascadero State Mental Hospital v. Scanlon* that Congress must use "unmistakably clear" language to signal its intent to abrogate states' Eleventh Amendment sovereign immunity, because the Eleventh Amendment "serves to maintain" the "constitutionally mandated balance of power between the States and the Federal Government."[75] This is a "stringent test," and the Court has repeatedly applied it in the years since.[76]

Although *Atascadero* was about sovereign immunity under the Eleventh Amendment, the Supreme Court has made clear that the principle *Atascadero* and subsequent cases relying on it articulated applies beyond that context. As the Court explained in *United States v. Bond*, the clear statement principle has been applied "when construing federal statutes that touched on several areas of traditional state responsibility."[77] The Supreme Court has applied it in cases involving "the essential sovereign interest in the security and stability of title to land,"[78] "States' traditional and primary power over land and water use,"[79] "in the sensitive relation between federal and state criminal jurisdiction,"[80] and states' power to set the qualifications for their own judges.[81]

Indeed, the Supreme Court has held that the term "entity" in a federal statute—the same term used in IRCA's prohibition on hiring undocumented people—did not speak clearly enough to include state political entities where doing so would entrench upon an area of traditional state authority.[82] *Nixon* involved a Missouri provision that prohibited local governments from providing certain telecommunications services. However, a federal statute—the Telecommunications Act of 1996—expressly preempted state laws "prohibiting the ability of any entity" to provide telecommunications services. Municipal governments in Missouri petitioned the FCC to obtain a ruling that the Telecommunications Act preempted Missouri's statute barring its own local governments from providing telecommunications services. The issue reached the Supreme Court, which ruled in Missouri's favor. It acknowledged that the term "entity" "can be either public or private," but nonetheless

74. Raygor v. Regents of Univ. of Minnesota, 534 U.S. 533, 543 (2002) (internal citations omitted).

75. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (internal citations omitted).

76. Dellmuth v. Muth, 491 U.S. 223, 228 (1989); *see also Atascadero*, 473 U. S. 253 (J. Brennan, dissenting) (calling the "unmistakably clear" language requirement a "special rule[] of statutory draftsmanship.").

77. Bond v. United States, 572 U.S. 844, 858–59 (2014).

78. BFP v. Resol. Tr. Corp., 511 U.S. 531, 545 n.8 (1994).

79. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 174 (2001).

80. United States v. Bass, 404 U.S. 336, 349 (1971).

81. Gregory v. Ashcroft, 501 U.S. 452, 452 (1991) ("Because congressional interference with the Missouri people's decision to establish a qualification for their judges would upset the usual constitutional balance of federal and state powers, Congress must make its intention to do so unmistakably clear in the language of the statute.") (internal citations omitted). We discuss *Gregory* in much greater detail below, *infra* Part II.a.

82. *See* Nixon v. Missouri Mun. League, 541 U.S. 125, 140 (2004).

found that the statute did not speak with sufficient clarity to include "the State's own subdivisions," in part because doing so would "trench on the States' arrangements for conducting their own governments."[83] Justice Scalia, joined by Justice Thomas, concurred, arguing that the absence of a clear statement manifesting Congress's intention to entrench upon an area of traditional State authority was sufficient to support the Court's opinion.[84]

*Nixon* is not the only instance of the Court applying the clear statement rule we describe outside the sovereign immunity context. For example, the Supreme Court has held that the word "person" in Section 1983 does not encompass states. As it explained in *Will v. Michigan*,

> *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States. . . "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[85]

Thus, it seems clear that courts considering the question whether IRCA binds state governments would have to apply a clear statement rule of statutory construction so long as applying IRCA to the states would intrude upon an area of traditional state authority or otherwise alter the balance of power between the federal government and the states. As explained below, there are compelling reasons to think that reading IRCA to bind state governments would in fact do both.

### 2. *IRCA Would Dictate the Qualifications of State Officials*

Perhaps the strongest argument for a clear statement rule favoring our view comes from the fact that if IRCA binds the instruments of state government, it then limits each state's power to set the job qualifications of its own officials. That surely would intrude on an area of traditional state authority. The Supreme Court described that principle in *Sugarman v. Dougall*, which struck down a New York statute that banned all non-citizens from holding positions in the classified competitive civil service, finding that the provision violated the Equal Protection Clause. However, in so ruling, the Court left some space for states to set their own rules with respect to the employment of non-citizens in state employment positions, recognizing that a State has the "broad power to define its political community," and that using its own

83. *Id.*
84. *Id.* at 141.
85. Will v. Michigan, 491 U.S. 58, 65 (1989) (internal citations and quotations omitted).

definition of "political community" to determine the qualifications for State positions "rest[s] firmly within a State's constitutional prerogatives."[86]

The Court has applied the state autonomy principle articulated in *Sugarman* several times, and on each occasion has recognized the states' power in this respect as foundational to the structure of the nation's federalist system. These cases clearly illustrate how IRCA could intrude upon traditional areas of state control if it applied to state governments; in fact, they suggest that applying IRCA to at least some state employment decisions could violate the Tenth Amendment. For example, in *Foley v. Connelie*, the Court upheld a New York statute that required police officers to be U.S. citizens.[87] Because "[p]olice officers very clearly fall within the category of important non-elective officers who participate directly in the execution of broad public policy," the state had authority to define who could hold that job.[88]

It is not hard to imagine how IRCA could (if applied to states) create constitutional problems in light of *Foley*, at least in states like California. There are approximately 2 million undocumented people in California. Police regularly encounter them, along with other California residents. What if California decided that at least some members of the California Highway Patrol should be undocumented to help foster relations between police and the large undocumented segment of the general population? *Foley* suggests that decision may be for California to make, rather than for the federal government to dictate.

Shortly after *Foley*, the Court applied the *Sugarman* principle again in *Ambach v. Norwick*, this time to permit states to deny employment to noncitizen teachers who refused to naturalize.[89] As *Ambach* concluded: "[c]ertainly a State also may take account of a *teacher's function as an example for students*, which exists independently of particular classroom subjects. . . we think it clear that public school teachers come well within the 'governmental function' principle recognized in *Sugarman* and *Foley*."[90]

Here again, it is not hard to imagine how applying IRCA to schools funded by the State of California would alter the constitutional balance and could give rise to serious constitutional problems under *Ambach* given the schools many undocumented students attend. What if California were to decide that schools serving large numbers of undocumented students should permit the hiring of undocumented teachers—so that they can better "function as an example for students,"[91] who are undocumented? IRCA would appear to

86. Sugarman v. Dougall, 413 U.S. 634, 643-48 (1973).
87. Foley v. Connelie, 435 U.S. 291, 300 (1978).
88. *Id.*
89. Ambach v. Norwick, 441 U.S. 68, 80 (1979).
90. *Id.* (emphasis added).
91. *Ambach*, *supra* note 88.

prohibit such hiring if it applies to state governments. But *Ambach* strongly suggests that the Constitution leaves that decision to the states.[92]

Perhaps the most compelling example of how applying IRCA's prohibition against the states would entrench upon their authority—and give rise to serious constitutional problems—arises in the context of the legal profession. *Gregory v. Ashcroft* concerned whether Arkansas could impose a mandatory retirement age on its judges notwithstanding the federal prohibition on age discrimination in the Age Discrimination in Employment Act (ADEA). Although the mandatory retirement rule would plainly have violated the statute if enacted by a private business, the Court applied the *Sugarman* principle to rule for Arkansas. As the Court explained, "[i]t is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."[93] Because "each State has the power to prescribe the qualifications of its officers. . . [and] it is a power reserved to the States under the Tenth Amendment," the Court read the federal statute prohibiting age discrimination not to apply.[94]

Although *Gregory* is not an immigration case, it clearly illustrates the Tenth Amendment problems involved with applying IRCA to similar types of state government offices. The State of California has *already* opened all "appointed civil offices" to adult state residents, regardless of immigration status,[95] and California *already* permits undocumented attorneys to gain admission to the bar.[96] If the Governor chose an undocumented attorney to work in a senior role in the Attorney General's office, or even appointed one to be a California Supreme Court Justice, could IRCA prohibit that appointment?[97] If it applies to states, it presumably would. Yet under *Gregory*, it is clear the Constitution would not permit that result.

As these examples show, reading IRCA to apply to state governments would indeed alter the federal-state balance as to at least some state employment positions. Therefore, under *Sugarman* and its progeny, that purpose should not be attributed to Congress unless it has made its intention "unmistakably clear."[98]

---

92. California's school districts are arms of the state. *See* Sato v. Orange Cty. Dep't of Educ., 861 F.3d 923, 934 (9th Cir. 2017) ("California school districts and [County Offices of Education], including defendant [Orange County Department of Education], remain arms of the state").

93. Gregory v. Ashcroft, 501 U.S. 452, 462-63 (1991), *quoting* Taylor v. Beckham, 178 U. S. 548, 570-571 (1900).

94. *Gregory*, 501 U.S. at 462-63.

95. Cal. Govt. Code 1020(b).

96. *See* Cal. Bus. & Prof. Code 6064(b); *see also* In re Garcia, 58 Cal. 4th 440, 315 P.3d 117 (2014).

97. *See* Fahy v. Justs. of Supreme Ct. of California, No. C 08-02496 CW, 2008 WL 4615476, at *3 (N.D. Cal. Oct. 17, 2008) (finding justices of the Supreme Court of California are part of the state and protected by Eleventh Amendment sovereign immunity). For a more detailed discussion of entities which are considered part of the state, *see infra* Part III.

98. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (internal citations omitted).

Opponents of the view that the clear statement standard applies may argue that *Sugarman* and the cases following it give states some discretion to *exclude* certain people from the "political community" and thus public office, but not to *include* people excluded under federal law. There is some language in the opinions suggesting such a distinction.[99]

However, although both *Foley* and *Ambach* (unlike *Sugarman*) upheld statutes restricting employment on the basis of immigration status, other language in those cases suggests they would also constrain federal laws that restrict the power of states to *include* immigrants within the greater political community, rather than just state laws that exclude people otherwise included. In *Gregory*, for example, the court stated, "each State has the power to prescribe the qualifications of its officers. . .It is a power reserved to the States under the Tenth Amendment."[100] Similarly, *Ambach* spoke of establishing *qualifications* for positions, rather than excluding people from them, as the heart of the states' power in this context: "[t]he people of New York, acting through their elected representatives, have made a judgment that citizenship should be a qualification for teaching the young of the State in the public schools."[101]

Reading the federalism principles underlying the *Sugarman* line of cases to apply only to laws restricting noncitizen participation also has another serious problem: there is a long history of state *voting rights* laws that define political community more broadly than does the federal government. As many as forty states and federal territories at one point permitted noncitizens to vote.[102] Nor is such voting merely a thing of the past. Some states continue to permit limited noncitizen voting to this day. Maryland, for example, permits municipalities to maintain a "supplemental list of. . . individuals who are not on the statewide voter registration list but who may otherwise be qualified to register to vote with the municipal corporation."[103] Thanks to this state law, six municipalities in Maryland permit noncitizens to vote in municipal

---

99. *See Sugarman*, 413 U.S. at 649 ("A *restriction* on the employment of noncitizens, narrowly confined, could have particular relevance to this important state responsibility, for alienage itself is a factor that reasonably could be employed in defining 'political community.'") (emphasis added); Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) ("The *exclusion* of aliens from basic governmental processes is. . . a necessary consequence of the community's process of political self-definition.") (emphasis added); *Ambach*, 441 U.S. at 75 ("It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in *limiting* the participation of noncitizens.") (emphasis added); *Foley*, 435 U.S. at 297 (noting "although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens").

100. *Gregory*, 501 U.S. at 462-63.

101. *Ambach*, 441 U.S. at 81.

102. RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 16 (2006); *see*, *e.g.*, An Act to prescribe the qualifications of voters and of holding office, 1849 Leg., Reg. Sess., ch. 4 sec. 1 (Mn. 1849) ("[A]ll free white male inhabitants over the age of twenty-one years, who shall have resided within this Territory for six months next preceding an election shall be entitled to vote").

103. Md. Code ANN., ELEC. LAW § 3-403(g) (LexisNexis 2024).

elections.[104] Similarly, the Illinois School Code permits noncitizens in Chicago to vote for local school council members.[105] As these examples show, states have long defined—and continue to define—their political communities more inclusively than does the federal government. This tradition of state inclusion suggests that the principle described in *Sugarman* and its progeny covers laws that include noncitizens as well.

At this point, one might wonder how the argument just discussed—that California has complete authority to fix the qualifications for its judges, and perhaps also for its teachers or police officers—could support the view that *all* other employees of the state are exempt from IRCA. After all, one must draw the constitutional line somewhere. Surely there are some student employment positions—and perhaps most of them—for which the states have no comparable authority. Does the *Sugarman* principle extend to the students running experiments working in the University of California's scientific laboratories or those serving food in its cafeterias?

The answer to this question comes again from a basic principle of statutory construction: the doctrine of constitutional avoidance. As the Supreme Court has long held, "'it is a cardinal principle' of statutory interpretation, however, that when an Act of Congress raises 'a serious doubt' as to its constitutionality, '[courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"[106] The Supreme Court has applied that rule not only when confronting constitutional problems in the case before it, but also when it identifies those problems in *other* situations that could arise under the interpretation of a statute it is considering. As Justice Scalia explained in an immigration-related case from 2005, "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern."[107]

That rule is crucial for understanding the central role that *Sugarman* and its progeny play in our argument. While it is undoubtedly true that the states' power to define the qualifications of their officials is limited to only some subset of officials to whom IRCA would otherwise apply, a court interpreting the statute would be obligated to construe it to avoid the serious constitutional problems related to such officials, even if the case before the court does not involve them. In other words, if it would create serious constitutional

---

104. HAYDUK, *supra* at 101; *see*, *e.g.*, Takoma Park, Md., Charter Amendment Resolution 1992-5A (Feb. 10, 1992), *codified* Municipal Charter City of Takoma Park, Art. VI sec. 601(a) ("Every person who (1) is a resident of the City of Takoma Park, (2) is at least sixteen (16) years of age. . .(3) does not claim voting residence or the right to vote in another jurisdiction, and (4) is registered to vote in accordance with the provisions of this Charter, is a qualified voter of the City").

105. ILL. COMP. STAT. ANN. 5/34-2.1(d)(ii) (West 2022) ("Eligible voters for each attendance center shall consist of the parents and community residents for that attendance center.").

106. Zadvydas v. Davis, 533 U.S. 678, 689 (2001).

107. Clark v. Martinez, 543 U.S. 371, 380 (2005).

problems to interpret IRCA to dictate what qualifications the states can employ for their highest-level officials, including judges (and other high-level attorneys), police officers, and teachers, then courts must avoid interpreting IRCA to create those problems *in any case*, even one just involving students working at a university bookstore.

The principle described by Justice Scalia in *Clark* has particular relevance here, as there is no obvious way to read the language enacting IRCA's prohibition on hiring undocumented people to carve out some state government officials but not others. As a textual matter, if IRCA applies to any state government jobs, it must apply to all of them. Thus, the most straightforward way to avoid the constitutional problem is to construe the statute not to apply to any state government employment.[108]

### 3. *IRCA Would Infringe Upon the States' Distinct Power to Regulate Employment*

The view that IRCA touches upon an area of traditional state control gains additional force from another line of authority, which concerns state regulation of immigrant employment more generally. The Supreme Court held fifty years ago, in the immigration context, that employment regulation is an area of traditional state control. *DeCanas v. Bica* held that a state law regulating the employment of non-citizens operated in an area of traditional state power, and therefore was not impliedly preempted by the federal government's immigration authority, even though, as the Court simultaneously recognized, the "power to regulate immigration is unquestionably exclusively a federal power."[109]

Although *DeCanas* predates IRCA, the Court has continued to apply its rule more recently, including by allowing states to regulate in ways that unquestionably touch on immigration enforcement (and alter the balance struck by IRCA), because IRCA did not clearly prohibit such regulation.[110] For example, the Supreme Court reaffirmed that state statutes involving the employment of noncitizens do not impinge upon the federal government's exclusive immigration power in *Chamber of Commerce v. Whiting*. *Whiting* held that Arizona's laws creating sanctions for employers that knowingly hire unauthorized workers were not impliedly preempted by IRCA because they fell within the safe harbor in the statute's preemption provision.[111] In so

---

108. *Gregory*, 501 U.S. at 464 (stating, "[a]pplication of the plain statement rule thus may avoid a potential constitutional problem," and construing the ADEA not to apply to certain state officials in order to solve constitutional problems associated with applying its federal mandatory retirement rules to state judges).

109. DeCanas v. Bica, 424 U.S. 351, 354 (1976).

110. *See* Kansas v. Garcia, 140 S. Ct. 791, 797 (2020) (*citing* De Canas v. Bica, 424 U.S. 351, 353 (1976)); *cf*. Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 606–07 (2011).

111. Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 606–07 (2011); *see also* 8 USC § 1324a(h)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws)").

finding, the court stated that "[i]mplied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives."[112] *Whiting* distinguished between the Arizona sanctions law before it and the provisions at issue in a series of other cases finding state laws preempted because they "upset the balance" Congress struck in passing federal law in "uniquely federal areas of regulation" such as foreign affairs and patent law.[113] In contrast, the employer sanctions regime created by the Arizona law did *not* involve a "uniquely federal" regulatory sphere. Subsequent litigation over similar Arizona provisions in the lower courts confirms that, under *Whiting*, the normal clear statement requirement for federal laws potentially infringing upon traditional state prerogatives remains in effect even for laws that have "effects in the area of immigration."[114]

The Court applied the principle articulated in *DeCanas* and applied in *Whiting* with even greater force in *Kansas v. Garcia*, which upheld the conviction of an unauthorized worker for using a false social security number to obtain employment under a Kansas statute plainly utilized to punish undocumented workers—something Congress was careful *not* to do in IRCA itself. Nonetheless, the Supreme Court upheld the provision. As the Court explained, "[a]s initially enacted, the INA did not prohibit the employment of illegal aliens, and this Court held that federal law left room for the States to regulate in this field."[115] The Court noted that IRCA greatly expanded federal regulation in the employment realm, but nonetheless found no conflict preemption because "the possibility that federal enforcement priorities might be upset is not enough to provide a basis for preemption."[116] More broadly, the court explained that IRCA does not "exclude a State from the entire field of employment verification. . . federal law does not create a comprehensive and unified system regarding the information that a state may require employees to provide."[117]

Under *DeCanas*, *Whiting*, and *Garcia*, states retain authority to regulate in ways that have incidental effects in an area of federal interest, including specifically in the realm of employment regulations involving noncitizens. While the Supreme Court has long held that "[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our

112. *Whiting*, 563 U.S. at 607.

113. *Id*. at 603-04.

114. The Ninth Circuit in *Puente Arizona v. Arpaio* rejected the argument that the presumption against preemption does not apply to Arizona's identity theft laws: "while the identity theft laws certainly have effects in the area of immigration, the text of the laws regulate for the health and safety of the people of Arizona." Puente Arizona v. Arpaio, 821 F.3d 1098, 1104 (9th Cir. 2016) (internal citations omitted).

115. Kansas v. Garcia, 140 S. Ct. 791, 797 (2020) (*citing* De Canas v. Bica, 424 U.S. 351, 353 (1976)).

116. *Id*. at 807. In making that statement, the Court rejected Defendant's argument for a broader understanding of federal preemption in the employment realm under Arizona v. United States, 567 U.S. 387 (2012).

117. *Id*. at 805-06 (internal citations omitted).

shores belongs to Congress, and not to the States,"[118] both *DeCanas* itself and the modern cases following it treat the states' power to regulate the employment of non-citizens who are *already here* as distinct from the core federal function of determining who may be admitted or deported, i.e., who may *immigrate* as such. In matters like employment—which touch on but are nonetheless ancillary to the core federal power to exclude and deport—these cases clearly recognize a role for state-level policymaking. While Congress displaced some of that authority in IRCA, that statute did not change the background rule that employment regulation is a traditional matter of state concern, nor did it foreclose all state autonomy in the employment sphere, as *Whiting* and *Garcia* show. While Congress no doubt had authority as a general matter to enact IRCA's prohibition (subject to the constitutional constraints discussed in Part I.B), the Supreme Court's recognition, in the immigration context, that employment regulation falls within States' "broad authority under their police powers to regulate the employment relationship to protect workers within the State,"[119] remains highly relevant when interpreting IRCA's reach. All regulations concerning the hiring of undocumented immigrants—even those that pertain to private employers—fall squarely within the states' traditional powers in the first instance, rather than within the federal government's power over immigration.[120]

Taken together, *DeCanas*, *Whiting*, and *Garcia* provide strong support for the view that the presumption against preemption and the clear statement requirement it triggers are applicable even where the exercise of state power touches on an area of federal interest. Because a state policy permitting an instrument of state government to employ undocumented people would be primarily concerned with employment, rather than the admission or deportation of non-citizens, such a policy would operate within an area of historic state power, which Congress may not curtail without a clear statement. And while IRCA undoubtedly occupies significant legislative space in the realm of non-citizen employment today, it was enacted only in 1986. Thus, state laws concerning the employment of non-citizens cannot be said to operate in a sphere where "the federal interest has been manifest since the beginning of our Republic and is now well established."[121]

---

118. Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

119. *DeCanas*, 424 U.S. at 356.

120. Although *Garcia* correctly stated that there was no general prohibition on hiring undocumented people prior to IRCA, federal regulations had restricted the employment of certain noncitizens present on non-immigrant visas for several decades before that. *See, e.g.*, Admission of Nonimmigrants: General, 17 Fed. Reg. 11488 (Dec. 19, 1952) (establishing conditions of nonimmigrant status, including not engaging in employment without authorization). However, unlike the prohibition IRCA enacted, the regulations did not prohibit *undocumented* immigrants from working at all. They regulated only certain individuals present on nonimmigrant visas. They also contained no criminal prohibition.

121. Knox v. Brnovich, 907 F.3d 1167, 1174 (9th Cir. 2018) (noting the presumption against preemption would not apply in such areas). *See also* Arizona v. United States, 567 U.S. 387, 423 (2012) (Scalia, J., concurring in part and dissenting in part) (comparing the clear statement rule as used in the presumption against preemption analysis, to the clear statement rule as used in Eleventh Amendment jurisprudence); *see also* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 546 (1992) (Thomas, J. and Scalia, J.,

* * *

To summarize, Part I.A presents a strong argument that the plain text of IRCA's prohibition on hiring undocumented people does not apply to the instruments of state government. But even were the textual evidence more mixed, as discussed in Part I.B, Congress would have had to speak more clearly than it did if it intended to bring states within IRCA's prohibition, for two reasons: because applying IRCA's prohibition to states would infringe upon their historic power to determine the qualifications of their officers, and because employment regulation is an area of historic state power, even where those employment regulations specifically concern noncitizens.

## II. QUESTIONS RAISED

Although the arguments described above are strong, they also upset a very long-settled understanding. As far as we have been able to discern, both the federal government and various state actors appear to have assumed that IRCA's prohibition constrains the arms of state government ever since its passage nearly forty years ago. Indeed, no one publicly advanced the interpretation of IRCA we advocate here at any point prior to 2022. Therefore, we surely must consider the questions raised by this admittedly novel view.

Here, we divide those questions into two parts: first, we address those which relate to IRCA itself, and second, we address questions not based on IRCA, but instead on other federal statutes that might conceivably prohibit the hiring of unauthorized workers even if IRCA does not.

### A. *Questions Related to IRCA*

We first address three questions related to IRCA. The first is grounded in IRCA's implementing regulations, the second involves IRCA's liability provisions, and the third relates to principles of federal supremacy and how they may inform our understanding of IRCA's purpose.

#### 1. *The Regulation*

In contrast to the statute, the regulations implementing IRCA do specifically refer to governmental entities, albeit not to "states" by name. Shortly after the statute's enactment, the Immigration and Naturalization Service promulgated 8 C.F.R. 274a.1(b), which defines "entity" as "any legal entity, including but not limited to, a corporation, partnership, joint venture, governmental body, agency, proprietorship, or association."[122] Regulations generally have the force

---

concurring in part and dissenting in part) (discussing whether a clear statement is appropriate for interpreting express preemption provisions, stating "our jurisprudence abounds with rules of "plain statement," "clear statement," and "narrow construction" designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied.").

122. 8 C.F.R. § 274a.1(b) (emphasis added).

and effect of law. Therefore, this objection goes, IRCA covers states even though the statute does not mention them.

There are two basic problems with this view. First, it is hornbook administrative law that administrative agencies cannot expand their authority beyond what Congress has provided by statute. When they do so, they act *ultra vires*—that is, beyond the legal authority conferred on them by Congress. The Supreme Court has enforced that rule vigorously in the immigration context.[123] In recent years this principle has become a key aspect of the Court's attempts to pare back administrative power.[124] Thus, if the ordinary principles of statutory construction described in Section I show that Congress did not bind the states, the agency cannot fill that gap.

Applying that principle here, it is clear that reading the regulation to encompass states when the statute's text does not do so would render the regulation *ultra vires*. The clear statement rule described in Section I.B requires Congress to explicitly express its intention to bind the states. The agency cannot do so on Congress's behalf.[125]

This argument gains force when one examines the precise terms of the regulation. While most of the terms in the regulation are either mentioned explicitly in the statute or plainly encompassed by the statutory terms, "governmental body" stands out because it has no statutory analogue. The statute defines "person" to include an "organization,"[126] which in turn is defined as an "organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects."[127] The regulation defines "entity" to include "any legal entity, including but not limited to, a corporation, partnership, joint venture, governmental body, agency, proprietorship, or association."[128] Most of these terms, including "corporation, partnership, joint venture, proprietorship," and "association" are either mentioned explicitly or encompassed by the statute's catch-all for "a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action." In contrast, "governmental body" has no comparable basis in the statute's terms.

The second problem with the regulation comes from its enactment history. The regulation was originally promulgated on May 1, 1987.[129] At that time,

123. Leocal v. Ashcroft, 543 US 1, 6 (2004) (agency lacked authority to subject immigrants to mandatory deportation based on DUI convictions); Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) (same, for simple possession of marijuana).

124. *See*, *e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2607-16 (2022) (adopting "major questions doctrine," and limiting EPA's authority to regulate carbon emissions at power plants).

125. Cf. Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1105 n.15 (9th Cir. 2001) (holding that courts should apply the constitutional avoidance canon prior to affording Chevron deference when interpreting federal immigration statutes).

126. 8 U.S.C. § 1101(b)(3).

127. 8 U.S.C. § 1101(a)(28).

128. 8 C.F.R. § 274a.1(b).

129. Control of Employment of Aliens, 52 Fed. Reg. 16621 (May 1, 1987).

IRCA contained no separate provision specifying that the term "entity" includes any branch of the Federal Government. But that changed in 1996, when Congress added subsection (a)(7). Even if the regulation had been a plausible interpretation of the statute as originally enacted, it could not remain so after Congress added that specification. There would have been no need for Congress to make clear that IRCA's prohibition applies to any branch of the "Federal Government" if it already covered any "governmental body," as the regulation provides.

### 2. *Liability Provisions*

A second set of questions arising from our interpretation of IRCA concerns its civil and criminal enforcement provisions. If state governments adopted our view, could their employees be criminally prosecuted or fined for knowingly hiring undocumented employees? Of course, this question does not go to the "merits" of whether IRCA applies, but rather to what consequences a state employer could face if the federal government, and later a court, disagreed with its interpretation of IRCA. In other words, if the federal government were to conclude that prosecuting such conduct were not a priority, or if it did but courts were to conclude that the state's interpretation is correct, there would be no civil or criminal consequences. Nonetheless, given that policymakers considering whether to adopt our approach would no doubt take the risk of such consequences very seriously, we think it important to address them here.[130]

The statute permits DHS to issue civil fines for knowing violations of IRCA's prohibition on hiring undocumented workers (though these fines would hardly be ruinous for any entity as large as the University of California).[131] It also creates criminal penalties for any "person or entity which engages in a pattern or practice of violations," and authorizes imprisonment of up to six months for the pattern or practice.[132] Finally, the statute prohibits harboring, smuggling, encouraging, or inducing unlawful entry.

Although one could imagine various possible strong legal defenses to any attempt to impose civil or criminal fines under these provisions, two warrant particular attention here. First, IRCA prohibits hiring "for employment . . . an

130. Both UC President Drake and Denver Mayor Johnstone have cited the risk of civil and criminal penalties as reasons not to adopt versions of what we propose here. *See* Michael V. Drake, M.D., Remarks at University of California Board of Regents Meeting (Jan. 25, 2024) (transcript available at https://perma.cc/BB6V-PPXS); Marc Sallinger, *Denver exploring possibility of hiring immigrants to work for city*, DENVER GAZETTE (Jan. 23, 2024), https://perma.cc/YML4-AX5M.

131. *See* 8 U.S.C. § 1324a(e)(4)(A). The maximum fine for an initial offense is $2,000 per unauthorized worker hired. For multiple repeat offenders, the maximum is $10,000 per unauthorized worker. By comparison, UCLA estimates that tuition for most in-state graduate residents is about $18,136 per year and for undergraduates about $13,225 per year. *See* UCLA, https://perma.cc/ZY7X-HPEP (last visited Mar. 30, 2024); UCLA, https://perma.cc/MK7T-MJSR (last visited Mar. 30, 2024). *See also* Miriam Jordan, *Students, Legal Scholars Push California Universities to Hire Undocumented Students*, N.Y. TIMES (Oct. 19, 2022), https://perma.cc/P2G9-HW6C.

132. *See* 8 U.S.C. § 1324a(f). The criminal penalty also authorizes fines of up to $3,000 per unauthorized worker hired.

alien knowing the alien is an unauthorized alien . . . *with respect to such employment*."[133] Thus, the statute requires that the employer know that the person being hired is not authorized to work in the job for which they are being hired. For all the reasons described in Section I, *supra*, it is at the very least not clear that IRCA prohibits undocumented people from being hired *for state employment*, because it does not say that it binds the instruments of State government when they act as employers.

That ambiguity matters because the Due Process Clause prohibits the government from imposing either civil or criminal penalties absent clear notice of what conduct is prohibited—a doctrine commonly known as "void for vagueness." "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'"[134] "The notice test of vagueness looks at the 'very words' of the statute in question to determine whether the statutory language is 'sufficiently precise to provide comprehensible notice' of the prohibited conduct."[135] It is very hard to imagine a successful criminal prosecution against state officials given the strong evidence described above that, at the very least, creates substantial ambiguity as to whether IRCA binds state employers.[136]

Second, the pattern or practice of conduct IRCA prohibits is "a person or other entity" "hir[ing]" any non-citizen who is "unauthorized . . . with respect to such employment." While that language clearly prohibits an individual employer from hiring an undocumented person to work *for them* and prohibits an "entity"—such as a corporation—from engaging in such hiring, it does not clearly criminalize a person who acts as the *agent* of another person in hiring an undocumented worker. Imagine, for example, a Human Resources ("HR") officer who works at the University of California. That individual may process the paperwork for hiring undocumented students as employees pursuant to a university policy, but the HR officer neither makes the decision to offer those students a job nor provides their payment. For that reason, it is far from clear that the HR officer can be said to be the "person" who has "hire [d]" the undocumented student. Thus, even if the criminal penalties could be applied against the University itself—notwithstanding the very serious vagueness problems noted above—it would require a further stretch to apply those rules to individuals who act as the University's agents. Indeed, we have not found a criminal case under Section 1324a involving such conduct.

---

133. 8 U.S.C. § 1324a(a)(1) (emphasis added).

134. Johnson v. United States, 576 U.S. 591, 595 (2015). Although this requirement also applies in civil cases, the clarity requirement may vary based on the seriousness of the civil sanction imposed. *See generally* Sessions v. Dimaya, 138 S. Ct. 1204, 1212-13 (2018).

135. Anderson v. Morrow, 371 F.3d 1027, 1028 (9th Cir. 2004) (internal citations omitted).

136. Relatedly, were a state employer to have acted on the advice of counsel who opined that IRCA did not prohibit the conduct in question, that employer could have an advice of counsel defense. *See generally* Williamson v. United States, 207 U.S. 425, 453 (1908).

This conclusion is bolstered by the regulations defining "employer" to include "a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof."[137] On its face, this might appear to encompass HR officers like the hypothetical one imagined above. However, the regulation at issue is defining "employer," not "person or other entity." In other words, the definition of "employer" includes "person or entity"—i.e., those described in IRCA's prohibition—*as well as* agents. Under the regulations, then, "employer" is a broader category than the "person[s] or other entit[ies]" described in IRCA's prohibition.[138]

Opponents of our view have also floated the idea that University officials could be prosecuted under three closely related provisions of the alien smuggling statute that punish transporting or harboring people who come here unlawfully and "encouraging or inducing" them to do so, but that possibility is even more unlikely.[139] The Supreme Court construed the last of these provisions very narrowly in *United States v. Hansen*.[140] In the course of construing the encouragement provision narrowly, *Hansen* rejected the suggestion that it might criminalize, among other acts, "a minister who welcomes undocumented people into the congregation and expresses the community's love and support," or "a government official who instructs undocumented members of the community to shelter in place during a natural disaster."[141] A university who hired qualified students, or indeed other undocumented people for various other jobs to which they might apply, would appear to justify similar treatment. Even before *Hansen*, courts had held that conviction under the harboring provision required "a level of knowledge and intent beyond the mere employment of illegal aliens."[142] It requires a showing that "the defendant intended to violate the law."[143]

### 3. *Federal Supremacy*

A third question likely to arise for anyone considering this issue concerns the role of federal supremacy. As noted above, it is hornbook immigration law that the federal government exercises supreme authority in this realm—even if *DeCanas*, *Whiting*, and *Garcia* show that supremacy is somewhat tempered in the employment context. But while the statutes upheld in those cases were consistent with the broader federal purpose, here, the argument

137. 8 C.F.R. § 274a.1(g).
138. 8 U.S.C. § 1324a(a)(1).
139. 8 U.S.C. § 1324(a)(1)(A)(ii-iv).
140. United States v. Hansen, 143 S. Ct. 1932, 1946 (2023) (construing the "encourage and induce" provision of 8 U.S.C. 1324(a)(1)(A)(iv) to punish only "purposeful solicitation and facilitation of specific acts known to violate federal law").
141. *Id.* at 1947.
142. United States v. Khanani, 502 F.3d 1281, 1289 (11th Cir. 2007); *see also* United States v. Anderton, 901 F.3d 278, 284 (5th Cir. 2018) (same).
143. United States v. Tydingco, 909 F.3d 297, 304 (9th Cir. 2018) (finding jury instruction deficient and remanding for new trial where defendant brought a child into the US to attend school) (*citing* United States v. You, 382 F.3d 958, 966 (9th Cir. 2004)).

goes, the interpretation of IRCA we advance would radically undermine it by permitting states to hire people unauthorized to work under the federal scheme. Notwithstanding *DeCanas*, *Whiting*, and *Garcia*, these skeptics might argue, our reading gives insufficient weight to the massive shift in IRCA's enforcement scheme that could arise if the states accept our reading of the statute. If in fact states can hire undocumented students because IRCA does not bind them, then states could presumably hire undocumented workers for any other existing job. Nor would the possibilities be limited to *current* jobs. If we are correct, then nothing in IRCA would stop states from developing work programs specifically to employ several million undocumented workers, which would seem to undermine IRCA's goals in somewhat spectacular fashion.

These skeptics might point to the Ninth Circuit's recent en banc decision in *Geo v. Newsom*[144] for support. *Geo* struck down AB 32, a California statute that had banned privately contracted prison facilities (including facilities for incarcerating immigrants) from operating in the state, subject to certain exceptions. Geo Group had challenged the statute on preemption grounds, arguing that it dramatically interfered with federal immigration enforcement by effectively controlling federal operations in the State of California (because the federal government relied almost exclusively on private immigration prisons in the state). In response, California had argued that the court should apply a clear statement rule because "courts presume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress"—an argument superficially similar to the one we advance here.[145] But the Ninth Circuit rejected that view and ultimately found the statute preempted, ruling that "we have never applied the presumption [against preemption] to a state law that *would control federal operations*."[146] These skeptics might argue that if California cannot ban the federal government from operating private immigration jails because doing so would undermine the federal government's enforcement operations, how can it employ thousands of undocumented workers in direct contravention of IRCA's manifest purpose?

While these arguments have some force, they cannot ultimately carry the day for three principal reasons. *First*, caselaw about which state laws may or may not be preempted by IRCA tells us very little about the scope of IRCA in the first place, which is an analytically prior question. Indeed, if our account of IRCA is correct, then its purpose is *not* to cover all state hiring decisions, because Congress did not intend to impinge on state sovereignty by dictating the qualifications that states could impose on their own employees. Put another way: if IRCA does not bind states, then it leaves them free of

144. Geo Grp., Inc. v. Newsom, 50 F.4th 745 (9th Cir. 2022).
145. *Id.* at 761 (internal citations omitted).
146. *Id.* (emphasis added).

federal control in this area irrespective of whether they enact any law or policy concerning immigrants.

*Second*, and relatedly, this objection appears to assume that every state will open every conceivable job to undocumented people, thereby obliterating IRCA's goals. But there is no reason to assume that would be the case (let alone that Congress would have imagined it in 1986). It is far more likely that many states will not open any jobs to undocumented people, while others may open certain classes of jobs—such as those available to university students—while leaving others closed. That result would alter the current landscape in certain respects, but it could hardly be said to render IRCA entirely toothless.

*Third*, the fact that permitting states to hire undocumented workers would undermine IRCA's goals to some degree does not suffice to render our interpretation contrary to the statute's purpose. As we referenced in Part I.B., the Supreme Court has repeatedly addressed the question whether federal statutes prohibiting certain kinds of conduct also permit enforcement of their proscriptions against states in federal court. Those cases almost always involve statutes whose general purpose would be undermined to some degree if they did not permit such enforcement against states. Yet the Supreme Court nonetheless read them to lack the clarity needed to limit state power in that way.

For example, 42 U.S.C. 1983, the statute at issue in *Will v. Michigan*, would no doubt better fulfill its purpose of ensuring fidelity to federal constitutional rights if it created a cause of action against state governments.[147] Yet the Supreme Court held that its provision permitting suits against "persons" did not speak clearly enough to authorize suits against states. Similarly, the general purpose of the Rehabilitation Act of 1973, which prohibits discrimination against people with disabilities in programs or activities receiving federal financial assistance,[148] would likely have been better served if it made states liable to suit. But the Supreme Court nonetheless held it was not clear enough to authorize such suits in *Atascadero*. The Court recognized that the statute by its terms provided remedies to "any recipient of Federal assistance," and "there is no claim here that the State of California is not a recipient of federal aid under the statute,"[149] but these considerations were insufficient to create liability for states. Given their sovereign interests, only a clear congressional statement could justify infringing on their autonomy in the employment realm.[150]

---

147. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983.").

148. 29 U.S.C. § 701 *et seq*.

149. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 245–46 (1985).

150. *Scanlon* at 247. Congress later amended the statute to make states subject to suit under the Rehabilitation Act. Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845 (1986).

Nor are these the only examples of the courts requiring explicit statutory language even where the manifest purpose of the statute might otherwise have sufficed. The Education for All Handicapped Children Act ("EHA") would surely have been more effective if read to authorize suits against states, given the "most basic of political knowledge that free public education is provided by and under the aegis of the states."[151] But instead of reading the statute as skeptics of this proposal would urge—that is, as permitting such suits to avoid undermining EHA's manifest purpose—the Supreme Court found the respondent's concern that subjecting states to suit was "necessary . . . to achieve the EHA's goals,"[152] to be "beside the point"[153]: the EHA did not explicitly permit suits against states, and therefore could not be read to do so.[154]

Thus, the fact that permitting the states to hire undocumented people would undermine IRCA's purpose to some degree cannot suffice to eliminate the background obligation that Congress must speak clearly to regulate state conduct in this realm. Such logic pays insufficient respect to our federal system, under which Congress must make plain its intention to intrude into areas of traditional state control with far clearer language than IRCA contains.

*Finally*, as to *Geo* specifically, the *en banc* Ninth Circuit acknowledged that the presumption against preemption could apply in immigration cases: for example, where the federal immigration regulation deals with an area of historic state power, "even if the law touches on an area of significant federal presence, *including immigration*."[155] It found the presumption inapplicable to the statute at issue in that case not because the underlying dispute involved immigration policy, but rather because the state law at issue "control[led] federal operations."[156] Our interpretation of IRCA plainly does not permit states to "control federal operations," and any broader reading of *Geo* would be hard to reconcile with both Supreme Court and Ninth Circuit authority permitting states to establish their own immigrant-specific employment policies.[157]

### B. *Questions Related to Other Statutes*

Although, as we have argued above, IRCA is best read to not prohibit the instruments of state government from hiring undocumented people, one

---

151. Muth v. Cent. Bucks Sch. Dist., 839 F.2d 113, 129 (3d Cir. 1988), *rev'd sub nom*; Dellmuth v. Muth, 491 U.S. 223 (1989), *citing* David D. v. Dartmouth School Comm., 775 F.2d 411, 422 (1st Cir.1985).

152. Dellmuth v. Muth, 491 U.S. 223, 228 (1989).

153. *Id*. at 230.

154. *Dellmuth* at 232. Again, Congress subsequently amended the statute to explicitly abrogate states' sovereign immunity and permit them to be sued. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, Tit. I, § 101, 118 Stat. 2647, 2659 (Dec. 3, 2004).

155. Geo Grp., Inc. v. Newsom, 50 F.4th 745, 761 (9th Cir. 2022) (internal quotations omitted) (emphasis added).

156. *Id*.

157. *See* Kansas v. Garcia, 140 S. Ct. 791, 797 (2020) (*citing* De Canas v. Bica, 424 U.S. 351, 353 (1976)); *cf*. Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 606–07 (2011).

might reasonably ask whether any other legal constraints prohibit such hiring. We have not located any in *federal* law. However, whether *state* laws prohibit such hiring is a distinct question. In California there are no such state laws, but other states may present different questions. Below we address three potential legal constraints—all outside IRCA—that raise enough concerns to warrant brief mention here.

*First*, 8 U.S.C. 1621, enacted in 1996, prohibits states from providing any "State or local public benefit" to unauthorized individuals, except "through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility."[158] That statute has been central to disputes involving other immigrant-inclusive measures. However, it likely does not apply here because work authorization is not a public benefit, unlike, for example, professional licenses and food assistance.[159] That being said, it is not inconceivable that a court might conclude that Section 1621(c)'s reference to "contract" could be read to encompass employment by contract, and on that basis to include at least some forms of employment. For that reason, a state government seeking to affirmatively authorize hiring along the lines we advocate here might choose to say explicitly that its law is intended to satisfy Section 1621's requirements. Even without such clarification, however, we think the clearly superior reading is that while Section 1621 could require the state to alter what types of employment-related benefits undocumented employees receive, it has no bearing on whether the state may hire them.

Second, although the state as an employer would still have obligations to withhold wages for Social Security and Medicare,[160] and federal unemployment,[161] those obligations do not pose an obstacle to hiring undocumented individuals. There are already many people who pay into these federal benefits programs but are not eligible for the benefits. Many people who do not have Social Security numbers currently pay into federal benefits programs—they paid approximately $5.5 billion under the Federal Insurance Contributions Act ("FICA") in 2015—even though they are not eligible to receive those benefits without a social security number.[162] Undocumented individuals can of course decide for themselves if they want to seek employment with the state even though they would not qualify for certain federal

158. Martinez v. Regents of Univ. of California, 50 Cal. 4th 1277, 1295 (2010), *citing* 8 U.S.C. § 1621(d).

159. *See* 8 U.S.C. § 1621(c)(1) (defining "State or local public benefit" to mean, inter alia, "any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government" and "retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit").

160. 26 U.S.C. § 3101(a).

161. 26 U.S.C. § 3301.

162. *See Annual Report to Congress 2015*, NATIONAL TAXPAYER ADVOCATE 1, 199 (2015) https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1.pdf; Social Security Administration, Social Security Numbers for Noncitizens, publication No. 05-10096 (Sept. 2021), perma.cc/8GZ3-U3J8.

benefits. But the laws governing these benefits would not prevent them from doing so.

Third, where IRCA is silent on the question whether states may hire undocumented people, state law could fill the void. Indeed, California law previously did prohibit the hiring of undocumented people.[163] That statute was the subject of *DeCanas*, which we discussed in Part I.B.3.

However, California State law no longer prohibits hiring undocumented individuals.[164] On the contrary, the California Fair Employment and Housing Act prohibits discrimination on the basis of national origin, and the regulations implementing that provision state that "it is an unlawful practice for an employer or other covered entity to discriminate against an employee because of the employee's or applicant's immigration status, unless the employer has shown by clear and convincing evidence that it is required to do so in order to comply with federal immigration law."[165] Additionally, in 2020 California enacted other legislation that permits undocumented people to hold appointed or elective civil office, "[n]otwithstanding any other law."[166] Such a person "may receive any form of compensation that the person is not otherwise prohibited from receiving pursuant to federal law."[167] Moreover, in 2014 and 2015, California also created civil penalties for businesses who report workers' immigration status in response to undocumented workers exercising their labor rights.[168]

While these provisions show that California law encourages state employers to hire undocumented people where federal law does not clearly prohibit it, other states may have statutes that do the opposite. Whether any given institution outside of California could hire undocumented workers under its own state law is beyond the scope of our discussion here.

## III. IMPLICATIONS: WHICH INSTITUTIONS ARE FREE TO HIRE UNDOCUMENTED WORKERS?

The argument we have advanced above—that IRCA does not bind state governments—obviously has profound implications for the immigration law and policy landscape. If we are right, state governments are *already* free to establish their own rules for hiring undocumented people into state government jobs, because federal law is silent on the matter. But exactly how significant that shift could turn out to be will depend on the answer to another question: which institutions constitute state government for purposes of IRCA?

---

163. *See* Kansas v. Garcia, 589 U.S. 191, 195 (2020) ("As initially enacted, the INA did not prohibit the employment of illegal aliens, and this Court held that federal law left room for the States to regulate in this field." (citing De Canas v. Bica, 424 U.S. 351, 353 (1976))).

164. *See* DeCanas v. Bica, 424 U.S. 351, 354 (1976).

165. CAL. CODE REGS. tit. 2, § 11028(f)(3).

166. CAL. GOV'T CODE § 1020(a)-(b).

167. *Supra* note 164, § 1020(c).

168. *See* CAL. LABOR CODE § 244(b); CAL. BUS. & PROF. CODE § 494.6.

It is not immediately obvious how to answer that question. On one hand, it presents a question about the intent of the Congress that enacted IRCA. On the other hand, as we have established above, the statute's text and other interpretive tools illustrate that Congress likely did not consider the issue, and therefore had no discernible intent on the question—which is why the default rule favoring state autonomy comes into play.[169]

Fortunately, however, there are several sources one might consult to determine, in general, which instruments of government count as the state, and it is quite natural to impute the results to Congress in the absence of specific guidance. We focus here on three of them.

First, state sovereign immunity doctrine offers a useful starting point, as it determines which entities may be sued for failing to comply with the provisions of a statute. That source of authority sets a useful floor as to which entities are bound by the statute in the first place. Stated differently, if an instrument of government can assert the shield of state sovereign immunity, it is probably an arm of the state.[170]

Second, we look to state law defining which arms of government exercise the authority of the state. Such law may be found in state constitutional or statutory law, but in either event where we find state law provides explicitly that some instrument of government is acting *as the state*, it is reasonable to assume that Congress would have viewed that instrument as the state—whether or not it is immune from judgments under sovereign immunity doctrine.[171]

Third, we must look to areas where state officials exercise certain important duties, such that the regulation of those duties by the federal government would raise constitutional concerns, as described in Part I.B. Where such

---

169. The definitional provisions of the INA define "state" simply as including "the District of Columbia, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands." 8 U.S.C. § 1101(a)(36).

170. As the Court explained in *Atascadero*, "[i]t denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.2 (1985) (responding to the claim that Eleventh Amendment state sovereignty exempts states "from compliance with laws that bind every other legal actor in our Nation."). The Supreme Court has also used state sovereign immunity doctrine to determine the scope of a statute in another context: in *Will v. Michigan*, the court acknowledged the distinction between the Eleventh Amendment and 42 U.S.C § 1983 but noted that "in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration." Will v. Michigan Dep't of State Police, 491 U.S. 58, 66–67 (1989). *See also* Regents of the Univ. of California v. Doe, 519 U.S. 425, 427 n.2 (1997) (noting it is not "necessary to decide whether there may be some state instrumentalities that qualify as 'arms of the State' for some purposes but not others.").

171. Although they are distinct, there is of course substantial overlap between sovereign immunity doctrine and the law defining whether any given arm of government is acting as the state. *See generally* Mitchell v. Los Angeles Cmty. Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1988) (to determine sovereign immunity, "the court looks to the way state law treats the entity."); Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982) (to determine sovereign immunity, "the court will look at the way state law treats the governmental entity."); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) ("The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity. . . The answer depends, at least in part, upon the nature of the entity created by state law."). We discuss the Ninth Circuit's most recent treatment of this issue *infra*.

concerns exist, it is reasonable to assume that Congress would not have intended to trench upon those state officials' authority in deciding whom to hire.

One might object that adopting these approaches impermissibly leaves the scope of IRCA dependent on state law, which could be seen as a strange result for a federal statute with substantial preemptive force. However, there is nothing odd about imputing to Congress a desire to piggyback on state law rather than construct its own classification regime out of whole cloth. In fact, notwithstanding federal supremacy in the immigration realm, federal immigration law routinely incorporates state law when defining its scope.[172] The scope of IRCA in this respect "is a question of federal law [which] can be answered only after considering the provisions of state law that define the agency's character."[173]

Applying these rules, there should be no serious dispute that if IRCA does not prohibit state governments from hiring undocumented workers, then the University of California can hire its undocumented students. But what other state and local government institutions may be covered will be, at least in some cases, a more complex question. In what follows, we describe the relevant rules, and then apply them to identify some of the employers that would be considered part of the State of California. We do not attempt to answer the question as to all potential arms of the state even in California, let alone elsewhere, as this exercise can be challenging given the relevant canons of statutory interpretation and Congressional silence on the matter. Exploration of the various questions concerning which instruments of government may or may not fall under IRCA's purview presents an important area for further research.

### A. *Sovereign Immunity Test: The University of California and Beyond*

Even if we consider only the narrowest version of what counts as the state by focusing exclusively on sovereign immunity doctrine, there should be no serious dispute that the University of California ("UC") is part of the State of California. The United States Supreme Court recognized UC's status as part of the state in 1934, long before modern sovereign immunity doctrine was developed, noting that "by the California constitution the regents are. . . fully empowered in respect of the . . . government of the university, which. . . is a constitutional department or function of the state government."[174] Similarly, in 1957, a legal opinion of the California Attorney General stated that UC is

---

172. *See, e.g.*, Moncrieffe v. Holder, 569 U.S. 184, 190 (2013) (describing a "categorical approach" that relies on the scope of the underlying state criminal law to determine whether a given offense is deportable under federal immigration law).

173. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 n.5 (1997); *see also* Kohn v. State Bar of California, 87 F.4th 1021, 1025 (9th Cir. 2023).

174. Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 257 (1934).

"a branch of the state government equal and coordinate with the Legislature, the judiciary, and the executive."[175]

The Ninth Circuit reaffirmed this principle in cases determining that the UC is an arm of the state under sovereign immunity doctrine as it existed at the time.[176] It recently altered that doctrine in *Kohn v. State Bar of California*, but also clarified that the "new framework is unlikely to lead to different results in cases that previously applied the [prior test] and held an entity entitled to immunity."[177] Under *Kohn*, courts assessing whether a particular arm of state government is immune should focus on (1) the "intent as to the status of the entity, including the functions performed by the entity"; (2) the state's control over the entity; and "(3) the entity's overall effects on the state treasury."[178]

The Ninth Circuit's prior conclusion that the UC is an arm of the state is likely unchanged by *Kohn*. The first *Kohn* factor, which inquires into intent and the functions of the body, supports this finding. As with the California State Bar in *Kohn*, "California law 'characterizes' the [UC] as a 'governmental instrumentality.'"[179] Considering "the overall function of the University," the Ninth Circuit had previously found that the "regulation of public education is an important central government function,"[180] citing a 1957 California Attorney General legal opinion stating that UC is "a branch of the state government equal and coordinate with the Legislature, the judiciary, and the

---

175. 30 Ops. Cal. Att'y Gen. 162, 166 (1957).

176. *See* Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 839 (9th Cir. 1997); BV Eng'g v. Univ. of Cal., 858 F.2d 1394, 1395 (9th Cir. 1988) ("The University of California and the Board of Regents are considered to be instrumentalities of the state,"), *citing* Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982); Thompson v. Los Angeles, 885 F.2d 1439, 1443 (9th Cir. 1989) ("UC is an instrumentality of the state for purposes of the Eleventh Amendment."), *overruled on other grounds by* Bull v. City & Cty. of S.F., 595 F.3d 964, 981 (9th Cir. 2010); *In re* Holoholo, 512 F. Supp. 889, 895 (D. Haw. 1981) (finding "the UC is the state for purposes of the Eleventh Amendment," but finding UC had waived its immunity by impliedly consenting to suit in federal court in its contract with the U.S. Government), *superseded by statute, not in relevant part, as stated in,* Bator v. Judiciary, Adult Probation Div., 1992 U. S. Dist. LEXIS 22214, 11 (D. Haw. May 20, 1992); *see* also Ishimatsu v. Regents of Univ. of Cal., 266 Cal. App. 2d 854, 863, 72 Cal. Rptr. 756, 762 (1968) (noting "the University is a statewide administrative agency" as defined in Cal. Gov. Code § 11000).

177. *Kohn,* 87 F.4th 1021, 1031 (9th Cir. 2023).

178. *Id.* at 1030. Prior to *Kohn*, the Ninth Circuit considered: "(1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only in the name of the state; and (5) the corporate status of the entity." United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall, 355 F.3d 1140, 1147 (9th Cir. 2004) (finding that a construction management firm for California State University at Northridge was not an arm of the state for sovereign immunity purposes), *citing* Mitchell v. Los Angeles Comm. College Dist., 861 F.2d 198, 201 (9th Cir. 1989). Under that test, the state's legal liability was the most important factor. Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 839 (9th Cir. 1997) (finding the University of California is immune from suit under the Eleventh Amendment).

179. *Kohn*, 87 F.4th at 1032 (*quoting* Puerto Rico Ports Auth. v. Fed. Mar. Comm'n, 531 F.3d 868, 874 (D.C. Cir. 2008)).

180. Doe v. Lawrence Livermore Nat'l Lab., 65 F.3d 771, 774-75 (9th Cir. 1995), *citing* 30 Op. Cal. Att'y Gen. 162, 166 (1957) (stating UC is "a branch of the state government equal and coordinate with the Legislature, the judiciary, and the executive"), *and* Cal. Educ. Code § 66010.4(c) (UC is "the primary state-supported academic agency for research").

executive."[181] Similarly, the California Supreme Court has characterized the UC Regents "as a constitutionally created arm of the state."[182]

The second *Kohn* factor, which asks in part "'how the directors and officers' of the entity 'are appointed,'"[183] also supports finding that UC is an arm of the state. Under the California Constitution, the Governor both appoints members of the UC Board of Regents and serves directly as an *ex officio* Regent on the Board.[184]

Finally, the third *Kohn* factor regarding the UC's "financial relationship to California and its overall effects on California's treasury,"[185] also suggest the UC is part of the state. Again, the Ninth Circuit had previously found that because the "Eleventh Amendment protects the State from the risk of adverse judgments,"[186] UC "is an arm of the State of California."[187] Thus, it follows that UC is also part of the state for the purposes of interpreting which entities are not bound by IRCA.[188]

Moving beyond the University of California, other California public educational institutions are likely also part of the state under *Kohn's* sovereign immunity test. The Ninth Circuit had found the California state universities and colleges are arms of the state for sovereign immunity purposes under its prior Eleventh Amendment test in *Mitchell*.[189] The Ninth Circuit concluded that because UC is an arm of the state under the five-factor *Mitchell* test, and California state universities and colleges "have even less autonomy than the University of California," it followed that they too were immune.[190] Given this clear guidance, the Ninth Circuit found it unnecessary even to independently analyze the California state universities under *Mitchell*.[191]

---

181. 30 Op. Cal. Att'y Gen. 162, 166 (1957).

182. *Campbell v. Regents of Univ. of California*, 35 Cal. 4th 311, 321, 106 P.3d 976, 982 (2005) (quoting *Regents of Univ. of California v. City of Santa Monica*, 77 Cal. App. 3d 130, 135 (Ct. App. 1978)).

183. *Kohn*, 87 F.4th at 1035 (quoting *Puerto Rico Ports Auth.*, 531 F.3d at 877).

184. CAL. CONST. art. IX § 9.

185. *Kohn*, 87 F.4th at 1036.

186. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 431 (1997).

187. Doe v. Lawrence Livermore Nat. Lab'y, 131 F.3d 836, 839 (9th Cir. 1997).

188. As previously noted, courts have used Eleventh Amendment sovereign immunity doctrine to determine the meaning of a statute. *See Will*, 491 U.S. at 66-67, 70 (holding "neither a State nor its officials acting in their official capacities are "persons" under § 1983" and noting "the scope of the Eleventh Amendment is a consideration"); *see also* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690 n.54 (1978) (holding municipal and other local governments are "persons" under 42 U.S.C. § 1983, and noting the holding is "limited to local government units which are not considered part of the State for Eleventh Amendment purposes").

189. Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982) (stating "[T]he district court was correct in characterizing the California State College and the university system of which California State University at San Francisco is a part as dependent instrumentalities of the state.").

190. Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982), *citing* Slivkoff v. Bd. of Trs., 69 Cal. App. 3d 394, 400, 137 Cal. Rptr. 920, 924 (1977) ("Unlike the University of California, the California State University and Colleges are subject to full legislative control."), *and* Poschman v. Dumke, 31 Cal. App. 3d 932, 942, 107 Cal. Rptr. 596, 603 (1973) ("The trustees of California state colleges are a state agency created by the Legislature.").

191. *See*, *e.g.*, Stanley v. Trustees of California State Univ., 433 F.3d 1129, 1133 (9th Cir. 2006) ("We have previously held that the Trustees are an arm of the state that can properly lay claim to sovereign immunity."), *citing* Jackson v. Hayakawa, 682 F.2d 1344. California law, though not cited in

Similarly, the Ninth Circuit's determination that California community colleges are part of the state under *Mitchell*[192] will almost certainly stand under *Kohn*. For example, the Los Angeles Community College District (LACCD) "budget is made up of funds received from the state's general fund pursuant to a state calculated formula. In addition, some fees charged by the district's colleges go to the state."[193] Also, "any money judgment awarded against [LACCD] would necessarily be satisfied with state funds."[194] And LACCD "performs the essential governmental function of providing the citizens of the state with higher education."[195] Thus, all three *Kohn* factors point towards California community colleges being part of the state.

Moving now to primary and secondary education, California school districts are likely also arms of the state for purposes of IRCA, even applying our narrow sovereign immunity test. California utilizes a maximum per-pupil funding formula which commingles state and local revenue in a single fund.[196] This requires the state "to backfill any outlay of funds used to satisfy a judgment against a district or COE. . . making the state legally liable for any judgment against a school district."[197] California modified that system in Assembly Bill 97 ("AB 97"),[198] which created the Local Control Funding Formula ("LCFF"). Although it made significant changes, LCFF kept in place the maximum per-pupil funding formula.[199]

The Ninth Circuit found that California County Offices of Education ("COEs") and school districts are arms of the state for sovereign immunity purposes under *Mitchell*.[200] The same conclusion would follow under *Kohn*. The first *Kohn* factor weighs in favor of treating school districts as part of the state, because "school districts have the corporate status of agents of the state for purposes of school administration."[201] Under the second *Kohn* factor, AB

---

caselaw, supports this finding under both *Mitchell* and *Kohn*. For example, income received by California State Universities from leasing its property "shall be deposited in the State Treasury," Cal. Educ. Code § 89046 and, the names of the California State Universities belong to the State. Cal. Educ. Code § 89005.5.

192. Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1021 n.4 (9th Cir. 2010). Post-*Mitchell* courts have not further analyzed California State Colleges under the five-factor test given the guidance in *Mitchell*. *See*, *e.g.*, Applied Pro. Training, Inc. v. Mira Costa Coll., No. 10CV1372 DMS (POR), 2010 WL 11463186, at *2 (S.D. Cal. Nov. 30, 2010) (declining to re-analyze California State Colleges under the five-factor test, and collecting cases adopting the holding in *Mitchell* without further analysis).

193. *Id*. (citing *Hayakawa*, 682 F.2d at 1350).

194. Stones v. Los Angeles Cmty. Coll. Dist., 572 F. Supp. 1072, 1078 (C.D. Cal. 1983), *aff'd*, 796 F.2d 270 (9th Cir. 1986).

195. *Id*.

196. Sato v. Orange Cty. Dep't of Educ., 861 F.3d 923, 929-30 (9th Cir. 2017).

197. *Id*.

198. 2013 Cal. Legis. Serv. ch. 47.

199. Sato v. Orange Cnty. Dep't of Educ., 861 F.3d 923, 932 (9th Cir. 2017).

200. *Sato*, 861 F.3d at 934 ("California school districts and [County Offices of Education], including defendant [Orange County Department of Education], remain arms of the state and continue to enjoy Eleventh Amendment immunity.") In contrast, Nevada and Arizona school districts have found been found not to be arms of the state. Eason v. Clark Cty. Sch. Dist., 303 F.3d 1137, 1144 (9th Cir. 2002) (Nevada); Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cty., 343 F.3d 1036, 1050 (9th Cir. 2003) (Arizona).

201. *Id*., *citing Belanger*, 963 F.2d at 254.

97's requirement that school districts adopt Local Control and Accountability Plans ("LCAPs") "granted districts and COEs some measure of autonomy . . . but it did not delegate primary responsibility for providing public education."[202] Thus, public schooling remains a "central governmental function."[203] The third *Kohn* factor also weighs in favor of finding school districts are part of the state, because, state and local funds are "hopelessly intertwined" under the state's complex school funding scheme.[204] Thus, California school districts and county offices of education, like California public institutions of higher education, are arms of the state for sovereign immunity purposes and therefore should be considered outside the scope of IRCA's prohibition.

Given that arms of the state found to be immune under pre-*Kohn* analysis likely remain immune under *Kohn*,[205] various other California institutions are likely also arms of the state for purposes of IRCA, including municipal courts,[206] California superior courts,[207] and state prisons.[208] Some firefighting forces would also likely be considered part of the state, such as the California Department of Forestry and Fire Protection (Cal Fire) and California Department of Parks and Recreation.[209]

### B. *Local Governments: Arms of the State Under State Law*

Under the second approach we have identified for determining what institutions of government count as the state for purposes of IRCA, even arms of government—including local government—that do *not* enjoy sovereign immunity may be considered part of the state, because state constitutional or

---

202. *Sato*, 861 F.3d at 933.

203. *Id*., *citing Belanger*, 963 F.2d at 253.

204. Sato v. Orange Cty. Dep't of Educ., 861 F.3d 923, 932 (9th Cir. 2017), *citing* Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 252 (9th Cir. 1992) (finding pre-AB 97, that Madera Unified School District enjoyed Eleventh Amendment sovereign immunity).

205. *Kohn*, 87 F.4th at 1031.

206. Franceschi v. Schwartz, 57 F.3d 828, 831 (9th Cir. 1995) ("Given the extensive control exercised by the state over the municipal courts, we conclude that [South Orange County Municipal Court] is an arm of the state [and] it is protected from this lawsuit by Eleventh Amendment immunity.").

207. Although careful treatment of the issue is beyond the scope of this paper, we would assume that our theory would permit the State of California to hire undocumented judges because judges are employees of the state. Whether judges themselves are protected by sovereign immunity is unclear. The Ninth Circuit has held that suits in federal court against at least some such judges are barred by the Eleventh Amendment. *See* Simmons v. Sacramento Cty. Super. Ct, 318 F.3d 1156, 1161 (9th Cir. 2003) (affirming dismissal of claims against Sacramento County Superior Court and stating "Plaintiff cannot state a claim against the Sacramento Superior Court (or its employees), because such suits are barred by the Eleventh Amendment."); *see also* Blount v. Sacramento Cty. Superior Ct., 559 F. App'x 623 (9th Cir. 2014) (same). However, it has also held that Superior Court judges are not protected by Eleventh Amendment immunity, Hyland v. Wonder, 117 F.3d 405, 414 (9th Cir.), (opinion amended on denial of reh'g), 127 F.3d 1135 (9th Cir. 1997) ("The judges have not met their burden to show that they are protected by Eleventh Amendment immunity."). California courts in general are likely considered part of the state. *See* Franceschi v. Schwartz, 57 F.3d 828, 831 (9th Cir. 1995). The justices of the California Supreme Court have been found to be protected by the Eleventh Amendment. Fahy v. Justs. of Supreme Ct. of California, No. C 08-02496 CW, 2008 WL 4615476, at *3 (N.D. Cal. Oct. 17, 2008).

208. *See* Holley v. Cal. Dep't of Corr., 599 F.3d 1108, 1110 (9th Cir. 2010) (dismissing suit against California prison officials in their official capacity because California did not waive State sovereign immunity by accepting federal prison funds).

209. The Director of Cal Fire is appointed by the California Governor. Cal. Public Resources Code § 701.

statutory law has conferred authority on them to exercise state power. Under the California Constitution, for example, the "State is divided into counties which are legal subdivisions of the State."[210] The State Legislature "shall provide for … an elected governing body in each county," which in turn "shall provide for the number, compensation, tenure, and appointment of employees."[211]

The state's delegation of this duty to counties is a serious matter: when a county exercises its duty to provide for the number, compensation, tenure, and appointment of employees, these provisions "trump conflicting state laws."[212] In *Curcini v. Cnty. of Alameda*, for example, a California Court of Appeals held that state statutes regulating overtime pay and meal breaks did not apply to charter county employees because the California Constitution specifically delegated control over matters of employee compensation to those counties.[213]

To take an example slightly farther afield, the Constitution of the State of Colorado grants cities and towns, including the City and County of Denver, authority to govern local and municipal matters.[214] It further states that such charters "shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith."[215] In other words, Colorado delegated its own power to regulate "local and municipal matters" to Denver.

The authority conferred to cities and states in Colorado's Constitution includes exclusive authority over employment matters. Article XX, Section 6 (a) by its terms grants to towns and cities the power to legislate upon, provide, regulate, conduct, and control: "The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees."[216] In other words, Article XX, Section 6 vests in the City and County of Denver "exclusive control over creation and terms of municipal officers."[217]

Given that local governments like the charter counties in California and the City and County of Denver in Colorado exercise the power of the state

---

210. CAL. CONST. art. XI, § 1(a).
211. CAL. CONST. art. XI, § 1(b).
212. Holmgren v. Cnty. of Los Angeles, 159 Cal. App. 4th 593, 601 (2008).
213. 164 Cal. App. 4th 629, 643 (2008); *see also* Dimon v. Cnty. of Los Angeles, 166 Cal. App. 4th 1276, 1281–83 (2008) (holding the state's meal period and meal period pay regulations did not apply to the county's probation officers because of the state's constitutionally-protected home rule).
214. COLO. CONST. art XX, § 6. Article XX, Section 6, adopted by voters in 1912, "vest[s]" cities and towns with the "power to make, amend, add to or replace the charter of said city or town, which shall … extend to all its local and municipal matters." *Id.*
215. *Id.*
216. *Id.* § 6(a).
217. Int'l Bhd. of Police Officers, Loc. No. 127 v. City & Cnty. of Denver, 521 P.2d 916, 917 (Colo. 1974). Although this power is "not unlimited," Colorado caselaw has "supported a broad interpretation of this provision." City & Cnty. of Denver v. State, 788 P.2d 764, 770 (Colo. 1990) (holding that the residency of Denver municipal employees is of local concern and invalidating a conflicting state statute).

directly—through express delegation under their state constitutional or statutory law—it is only reasonable to assume they should be considered part of the state for purposes of IRCA as well.

### C. *Constitutional Carve-Outs: School Teachers, Police Officers, and High-Level Officials*

Finally, some governmental bodies may have authority to hire undocumented workers as a matter of *federal* constitutional law, irrespective of whether they are part of state government as a matter of state law. To understand this, we must distinguish between the *arms* of government that are or are not considered part of the state, and the exercise of certain *powers* reserved to the state under the Constitution—such as the setting of qualifications for certain state positions. This distinction matters because, as we explained in Part I.B, even if a particular arm of government is not part of the state for purposes of either sovereign immunity doctrine or state law, where a local government is exercising powers delegated to it by the state, it too has a right to dictate the job qualifications for employees working in those positions. Under the *Sugarman* line of cases, schoolteachers, police officers, and certain high level state government officials fall into this category.[218]

Consider for example the LA County Office of Education. That office is part of LA County, and not a school district (like the one the Ninth Circuit already found to be an arm of the state).[219] Nonetheless, it could likely open teaching positions at the Los Angeles County School for the Arts ("LACHSA") to all applicants irrespective of immigration status, because under the Tenth Amendment the power to set the qualifications of "important government officials,"[220]—a group that teachers "come well within,"[221]—belongs to the state, which in this case, delegated the duty of "appoint[ing] employees"[222] to California counties.[223] If IRCA were read to prohibit LA County from setting qualifications in this way, it would raise serious constitutional concerns. That is, *regardless* of whether LA County would be considered part of the state for sovereign immunity purposes, when LA County is exercising state-delegated duties to determine qualifications for public school

---

218. *See*, *e.g.*, Ambach v. Norwick, 441 U.S. 68, 80 (1979); Foley v. Connelie, 435 U.S. 291, 300 (1978).

219. Sato v. Orange Cnty. Dep't of Educ., 861 F.3d 923, 934 (9th Cir. 2017) ("California school districts and [County Offices of Education], including defendant [Orange County Department of Education], remain arms of the state"). While the Ninth Circuit has yet to determine the status of LA County under *Kohn*, it found that LA County was not an arm of the state for sovereign immunity purposes under the *Mitchell* factors. Ray v. Cnty. of Los Angeles, 935 F.3d 703, 711 (9th Cir. 2019).

220. Gregory v. Ashcroft, 501 U.S. 452, 463 (1991).

221. *Ambach*, 441 U.S. at 80.

222. CAL. CONST. art. XI, § 1(b).

223. Effective 2023, California eliminated the requirement that appointed county officials be registered to vote in the county in which the duties are to be exercised (but maintained the requirement for elected officials). *See* Cal. Gov't Code § 24001; *see also* Assem. Bill 1925, 2021-2022 Reg. Sess. (Cal. 2022), https://perma.cc/U3AL-BUGD.

teachers, it exercises the state's Tenth Amendment powers under governing Supreme Court doctrine.

* * *

We have argued in this section that several different sources of law—sovereign immunity doctrine, the law allocating powers within the states, and the Supreme Court's *Sugarman* line of cases—all can be utilized to determine which arms of government count as the State for purposes of understanding IRCA's prohibition. Under that analysis, the University of California counts as the state, as do other public institutions of education in California and various other institutions of state and local government. As a result, these entities are not bound by IRCA's prohibition; they may already hire the best candidates regardless of immigration status.

While we offer this analysis to identify certain clear cases and set forth the relevant framework for conducting such analysis, more research is necessary to determine which arms of state and local government in various states should be understood as bound by IRCA's prohibition.[224]

## CONCLUSION

We have argued that state government employers already have authority to hire undocumented people because the federal prohibition against hiring unauthorized workers does not apply to the instruments of state government. Most importantly, the key provision does not mention states. That omission stands in stark contrast to the explicit inclusion of the "Federal Government" within the scope of IRCA's prohibition,[225] and also in contrast to other statutes that specifically refer to "the government of a State or political subdivision thereof,"[226] or use other comparable language when defining their scope.

Moreover, Congress almost certainly had to speak far more clearly than it normally would have to signal its intent to bind states in this context. Because any federal law dictating whom states can hire impacts the balance between federal and state power and infringes on the regulation of employment—a traditionally sensitive area of state control—Congress had to use manifestly clear language to bind states. It plainly did not do so in IRCA.

If our conclusion that states may hire the best candidate regardless of immigration status is correct, then various state entities are free to hire

---

224. For example, institutions of higher education in other states have been found to be arms of the state under the Eleventh Amendment. *See*, *e.g.*, Graham v. State, 956 P.2d 556, 566 (Colo. 1998) (Colorado); Krainski v. State ex rel. Bd. of Regents, 616 F.3d 963, 968 (9th Cir. 2010) (the "Nevada University system and its constituent institutions are agencies and instrumentalities of the State of Nevada within the meaning of the Eleventh Amendment"); Korgich v. Regents of New Mexico Sch. of Mines, 582 F.2d 549, 551 (10th Cir. 1978) (New Mexico). Of course, state laws would also need to be reviewed to ensure there is no separate prohibition against hiring undocumented people, separate from the federal prohibition in IRCA. *See*, *e.g.*, *infra* Part IV.

225. 8 U.S.C. § 1324a(a)(7).

226. 29 U.S.C. § 203(x); *see also Fair Labor Standards Amendments of 1974*, Pub. L. 93-259, sec. 6 (a)(6), 88 Stat. 60 (Apr. 8, 1974).

unauthorized workers—including state universities that wish to provide employment opportunities to all of their students regardless of status. The widespread adoption of such hiring practices across the full range of California educational institutions and beyond would give thousands of students access to crucial educational employment opportunities, allowing them to pursue the higher education they were promised when they chose to go to college.

California has long led the way in adopting policies that foster the inclusion of immigrants and the communities to which they belong. Some of its most significant policies have focused on undocumented youth and their need to access higher education. The idea described in this article offers the possibility of another important step in that ongoing legacy. As we have shown, no federal or state law prevents California from continuing to forge its legacy as a state that welcomes all immigrants.