



Center for Immigration Law and Policy

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To Whom It May Concern,

We write as immigration and constitutional law scholars to offer legal analysis of a proposal that representatives of the University of California have recently received. That proposal urges the University of California to hire undocumented students for positions within UC even if they lack employment authorization under federal immigration law.

We recognize that UC will likely have questions about whether it has legal authority to adopt this proposal. In our considered view, based on research and analysis of this proposal and more generally on our study of the relevant federal statutory and constitutional provisions over many years, no federal law prohibits UC from hiring undocumented students.

Our reasoning is set out in the attached memorandum, but the core argument is as follows. The federal prohibition on hiring undocumented persons as a general matter is codified in the 1986 Immigration Reform and Control Act, or IRCA, in particular 8 U.S.C. § 1324a. Under governing U.S. Supreme Court precedents, if a federal law does not mention the states explicitly, that federal law does not bind state government entities. Nothing in 8 U.S.C. § 1324a expressly binds or even mentions state government entities.

This body of long-settled U.S. Supreme Court doctrine has particular force here, in the context of laws governing the employment of noncitizens. The federal courts have consistently recognized that states have broad power to determine the appropriate qualifications for state positions, including qualifications related to immigration status. As a result, the U.S. Supreme Court established, before IRCA's enactment, that if Congress wants to change the balance between federal and state power by regulating in an area under traditional state control, it must do so with unmistakably clear language. It applied that rule to a California state law regulating the employment of noncitizens before IRCA's enactment.

Nothing in 8 U.S.C. § 1324a or anywhere else in IRCA comes close to meeting the U.S. Supreme Court’s requirement of a clear statement that binds states. In stark contrast to IRCA, other federal statutes that do bind states mention them explicitly. These statutes include, among others, the Fair Labor Standards Act, the Family and Medical Leave Act, and the Age Discrimination in Employment Act.

In short, when Congress passed IRCA, Congress did not curtail states’ historic power to determine the employment qualifications of state employees. As a result, IRCA’s prohibition on hiring undocumented persons does not bind state government entities. State entities can lawfully hire undocumented students irrespective of employment authorization status under federal law.

And as the U.S. Supreme Court recognized long ago, California law provides definitively that the University of California system is part of the State of California.

We recognize the immense work that has been—and continues to be—done by student advocates responding to the urgent need to expand employment opportunities for undocumented students, particularly given the precarious status of DACA. Each year, more and more students enter undergraduate and graduate programs without DACA. As a normative matter, we believe the time is ripe to explore pathways allowed by law to ensure employment opportunities for all UC students.

However, this letter and the attached memorandum focus on the legal aspects of our proposal. As law professors with considerable experience in immigration law, we write primarily to affirm that we believe that the legal foundation for hiring undocumented students within UC, as described in the attached memorandum, is sound.

Thank you for your attention.

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Center for Immigration Law and Policy

From: Ahilan Arulanantham, Hiroshi Motomura, Astghik Hairapetian (UCLA Center for Immigration Law and Policy)

Date: October 2022

Re: Memo Analyzing Whether IRCA Applies to States

Introduction

This memo assesses whether the Immigration Reform and Control Act of 1986 (“IRCA”) prohibits States from hiring unauthorized individuals. IRCA’s prohibition likely does not bind State government entities. The Supreme Court has repeatedly held in various contexts that Congress may not regulate State governments absent clear language to that effect. Under that clear statement rule, IRCA’s failure to mention States indicates their governments are not bound. Even apart from the clear statement requirement, under traditional principles of statutory construction, IRCA’s failure to mention States while specifically mentioning Federal entities, along with various other textual signals, suggests the statute likely does not bind State governments.

Discussion

This memo proceeds in four parts. *First*, it applies traditional rules of statutory construction to analyze whether IRCA binds States, focusing on (i) the textual evidence in the relevant provisions of IRCA itself; (ii) how the language of those provisions compares to comparable language in other statutes that either has or has not been read to bind States; and, (iii) the evidence to be drawn from other sections of IRCA that bears on whether IRCA binds States. It concludes that, on balance, the evidence probably favors a finding that IRCA does not bind States, even when applying normal principles of statutory construction absent any clear

statement rules. *Second*, it explains why Congress likely had to speak clearly to bind States in IRCA, and then why IRCA does not contain the requisite clear statement. *Third*, the memo looks forward to consider whether the University of California would be considered part of the State and thus not bound by IRCA. The answer is yes. The University of California is an arm of the State of California, as the federal courts, including the U.S. Supreme Court, have long recognized. *Finally*, the memo examines other laws relevant to hiring and concludes that they do not restrain California from hiring undocumented people.

I. Applying Normal Principles of Statutory Construction, IRCA Likely Does Not Bind State Government Entities

We begin by analyzing whether IRCA should be understood to bind States even absent any clear statement requirement. As explained below, under neutral principles of statutory construction—with no thumb on the scale arising from the fact that the issue at hand concerns State governments—we think IRCA is probably best read to not bind the States.

A. IRCA’s Prohibition Does Not Mention States

The plain text of the relevant provisions of the immigration code suggests State governments are not included in IRCA’s prohibitions. 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”). 8 U.S.C. 1324a(a)(1). A “person” is either an individual, 8 U.S.C. 1101(b)(3), 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,” 8 U.S.C. 1101(a)(28).¹ “Entity” is not defined as such in the statute,² but a 1996 amendment to IRCA enacted in the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”) specifies that an “entity” “includes an entity in any branch of the

¹ 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).

² [1] 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).

Federal Government.” 8 U.S.C. 1324a(a)(7).³ Thus, the statute mentions persons and various entities, including the Federal Government, as covered by its provisions, but nowhere mentions States.

A separate provision of IIRIRA provides further textual support for reading “entity” to not include States. At the same time that IIRIRA specified that the Federal Government was an “entity” without mentioning States, it added another section to the INA stating 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.” 8 U.S.C. 1373(a). Thus, the Congress that amended IRCA to specifically bind Federal agencies knew how to specify that State entities were bound by its legislation. Its failure to do so in IRCA’s prohibition against hiring unauthorized individuals provides strong evidence that States are not included in its definition of “entity.”

The argument set forth above applies the *expressio unius est exclusio alterius* canon of statutory interpretation: “the expression of one thing is the exclusion of others.” *Springer v. Gov’t of Philippine Islands*, 277 U.S. 189, 206 (1928). That canon is properly applied “when the result to which its application leads is itself logical and sensible.” *Ariz. State Dep’t of Pub. Welfare v. Dep’t of Health, Educ. & Welfare*, 449 F.2d 456, 472 (9th Cir. 1971); *see also Ford v. United States*, 273 U.S. 593, 611 (1927) (maxim has force “when in the natural association of ideas in the mind of the reader [there is] strong contrast” between what the statute covers and what it omits). Not only do IRCA’s definitions of “person” and “entity” fail to include State governments, but they manifest a “strong contrast,” *Ford*, 273 U.S. at 611, between Federal and State governments, by including only the former. *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”). Thus, it is “logical and sensible,” *Ariz. State Dep’t of Pub. Welfare*, 449 F.2d at 472, that State governments would be excluded.

³ *See Illegal Immigration Reform and Immigration Responsibility Act*, Pub. L. 104-208, 110 Stat. 3009-668, sec. 412 (Sept. 30, 1996).

B. Other Statutes That Do Bind States Suggest IRCA Does Not Apply to States

The language of statutes that *do* bind State governments provides the strongest support for the view that IRCA does not apply to States. These statutes—without exception—explicitly mention State governments. The cases interpreting this issue have often arisen in the context of Eleventh Amendment sovereign immunity doctrine, as courts have struggled with whether the State can be sued under various statutes despite their immunity. However, as we show below, such cases typically involved the Court first answering a threshold question of whether the statute applies to States at all, before determining whether or not States could be sued under it. In answering that question, the Court established strong support for our view that IRCA does not bind State government entities.

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.” Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(a), 78 Stat. 241, 253 (1964). However, in 1972, Congress 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.” Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 2(1), (5), 86 Stat. 103 (1972). These amendments “br[ought] the States within [Title VII’s] purview.” *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448-49 (1976) (finding Title VII abrogated State sovereign immunity).

A comparison of IRCA’s provisions to Title VII supports our reading. IRCA’s definition of “person,” like the 1964 version of Title VII, does not include governments, and thus is most naturally read to exclude governments. 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. FLSA at first excluded States as employers, but was amended in 1966 to cover certain State hospitals and schools. *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); *see also Emps. of Dep’t of Pub. Health & Welfare, Missouri v. Dep’t of Pub. Health & Welfare, Missouri*, 411 U.S. 279, 283 (1973);⁴ *see also 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 1974 amendments to FLSA broadened the definition of employers to reflect its coverage of State employers today. 29 U.S.C. 203(x) (“employer” includes a “public agency” which includes “the government of a State or political subdivision thereof”); *see also Fair Labor Standards Amendments of 1974*, Pub. L. 93-259, sec. 6(a)(6), 88 Stat. 60 (Apr. 8, 1974). Unlike FLSA, IRCA’s prohibition does not mention States.

The Rehabilitation Act (the Federal Government analogue to the Americans With Disabilities Act) supports our view of IRCA for similar reasons. Section 504 of the Rehabilitation Act also applies to States because it 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. 29 U.S.C. 794(a). “Program or activity” includes “a department, agency, special purpose district, or other instrumentality of a State or of a local government,” *id.* 794(b)(1)(A), and “a college, university, or other postsecondary institution, or a public system of higher education,” *id.* 794(b)(2)(A), among others. Thus, the

⁴ [1] 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 despite the Eleventh Amendment restriction. *Id.* at 285..

Rehabilitation Act explicitly applies to States, and States that receive funding under the Rehabilitation Act may be sued. *See* 42 U.S.C. 2000d-7(a)(1) (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) (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) (California may be sued under the Rehabilitation Act because it accepts funds). IRCA stands in stark contrast because it does not mention States at all.

The Age Discrimination in Employment Act (“ADEA”), like other statutes, explicitly covers States. Like the FLSA, ADEA initially excluded the States in its definitions. Age Discrimination in Employment Act of 1967, Pub. L. 90-202, § 11, 81 Stat. 601, 605 (1967) (“‘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”). In a 1974 amendment, States were explicitly added to the definition of employer. 29 U.S.C. 630 (“‘employer’” includes “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”); *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.”). Although the initial version of ADEA explicitly excluded States, the current version explicitly includes them; thus, IRCA is unlike the current version of ADEA which does bind States, because IRCA does not mention States at all.

The Individuals with Disabilities Education Act (“IDEA”) also explicitly binds 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. 20 U.S.C. 1412(a)(1), (6); *id.* 1412(h)(i)(2). 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 clarify that States can be sued despite State sovereign immunity. *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”).

The Family and Medical Leave Act (“FMLA”) also explicitly binds States. The FMLA defines “employer” to include “public agency,” 29 U.S.C. § 2611(4)(A), 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.” 29 U.S.C. 203(x). Thus, States are bound by the FMLA. *Nevada Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 735 (2003).

Whether IRCA’s prohibition applies to States is readily discernible from the cases interpreting these various statutes. IRCA contains no language declaring that it binds States; in fact it makes no mention of States as actors with obligations (although, as we shall see below, it does refer to States in certain provisions). It is therefore similar to Title VII before Congress amended it to explicitly cover States, and dissimilar to that statute now (as well as the Rehabilitation Act, FLSA, IDEA, ADEA, and FMLA), as they now all explicitly govern States. Thus, IRCA is best read simply not to apply to States.

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

References to “States” in IRCA—both in the section that includes the prohibition on hiring unauthorized individuals at Section 1324a and in other sections—also provide some support for the view that States are not bound by the prohibition, although the evidence is more mixed in this area.⁵

⁵ 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

Section 1324a makes a few references to States that, on balance, probably suggest 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. 8 U.S.C. 1324a(a)(5). That provision suggests compliance by State employment agencies is not mandatory, which the regulations confirm. *See* 8 C.F.R. 274a.6(a) (state agency “may, but is not required to, verify identity and employment eligibility.”). Second, Section 1324a(h)(2) “preempt[s] any State or local law imposing civil or criminal sanctions ... upon those who employ” unauthorized individuals. Thus, States are told what they may not do, i.e. impose sanctions, but are not told they may not hire unauthorized individuals. This too provides some evidence that IRCA does not bind States. Finally, two other provisions in Section 1324a mention States: IRCA permits alternative forms of identification in the case of a State that does not provide identification documents other than driver’s licenses. 8 U.S.C. 1324a(b)(1)(D)(ii). And the President “shall examine the suitability of existing Federal and State identification systems” for evaluating the security of the employment verification system. *Id.* 1324a(d)(1)(A). Those provisions do not appear to cut in either direction, except insofar as they make clear that Congress knew how to mention States explicitly in this statute. None of these provisions mention States in any way that implies that IRCA’s prohibition applies to them.

References to States in Section 1324b also do not provide clear evidence that States are bound by IRCA’s prohibition. Section 1324b provides a private cause of action against a “person” or “other entity” for discriminating against authorized individuals based on citizenship status. 8 U.S.C. 1324b(a)(1). But there is an exception 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

to a preexisting definition of State under the Immigration and Nationality Act: “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.

determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.” *Id.* 1324b(a)(2)(C).

One striking feature of this provision is that it permits State contractors and certain other employers to discriminate on the basis of citizenship status under certain conditions, but does *not* explicitly permit State governments to do the same. Thus, if “person” or “other entity” referred to States, this provision would produce the confounding result that States cannot engage in this kind of discrimination, while contractors and other types of employers can. This is particularly troubling in light of the States’ Tenth Amendment power to set qualifications for State government positions. *See generally Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (States have the Tenth Amendment power “to determine the qualifications of their most important government officials”). Thus, if “person” or “other entity” referred to States, the exception would need to explicitly also permit discriminatory hiring by State governments, rather than just discrimination by State contractors and others doing business with the State. The logical reading is that because IRCA does not apply to States, it is only necessary to provide an exception for State-related employment to ensure full protection of States’ Tenth Amendment power.

A skeptic might respond that the exception for discrimination “otherwise required in order to comply with law, regulation, or executive order” refers to *State* as well as federal law, and therefore would protect discriminatory State hiring. On that view, IRCA generally applies to States, but the first, broad exception protects IRCA from a Tenth Amendment challenge by exempting hiring conditions required by State law.

That view appears to run against the most natural reading of the text, however. The words “Federal, State, or local” appear in the clause about contracts, but not the clause about laws, regulations, and executive orders, which suggests that the latter encompasses only federal law, rather than “Federal, State, or local” laws, regulations, or executive orders.

There is some support for the skeptic’s view from a statement made by the primary sponsor of what became Section 1324b, Representative Barnett (Barney) Frank of Massachusetts. In response to a question about the exception for discrimination required to comply with law, he 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.” 98 Cong. Rec. 15938 (June 12, 1984).

However, later—and more authoritative—legislative history suggests the exception in Section 1324b(a)(1) was instead referring only to federal law. The 1986 Report of the House Committee on the Judiciary included a report from the Department of Justice, which summarized the exception thus: “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.” Immigration Control and Legalization Amendments Act of 1986, Report of the House Committee on the Judiciary on H.R. 3810, 99 Cong. H. Rept. 99-682 Part I, at 108 (July 16, 1986) (emphasis added). House Representative Dan Lungren of California used the same language to describe his understanding of the provision.⁶ *Id.* at 215. While ultimately the record appears mixed on whether legislators understood the first clause to refer only to federal laws, regulations, and executive orders, the statement of a single legislator cannot alter the otherwise-clear meaning of a statute’s text. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002) (“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.”). Therefore, on balance, Section 1324b’s provisions provide some additional evidence that States are not bound by IRCA’s prohibitions—both against discrimination and against hiring unauthorized individuals.

Perhaps the best textual evidence against our view comes from Section 1324c, which creates penalties for “any person or entity” which 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.” 8 U.S.C. 1324c(a)-(b). If IRCA does not apply to States to begin with (the argument goes), then this exception for State law enforcement should be

⁶ But he later states “the bill appears to recognize that there are some federal or state laws which legitimately limit some employment opportunities to citizens.” *Id.* at 216.

unnecessary. Thus, this provision suggests that States are *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 because Congress explicitly included the federal government in the definition of “entity,” its reference to State law enforcement here was necessary to protect federal law enforcement activities, and once that was so, the drafters named State government entities to avoid the inference that might otherwise have been drawn from their exclusion—i.e., that State law enforcement entities are *not* exempted from this prohibition. This alternative explanation is further supported by the fact that Section 1324c, unlike Sections 1324a and 1324b, refers to “any person or entity”—not a “person or *other* entity.” See 8 U.S.C. 1324a(a)(1); *id.* 1324b(a)(1). Thus, “entity” in this section has at least a potentially different meaning from its meaning in Sections 1324a and b. Most obviously, the definition in 1324c may not include “persons.” For that reason, that Congress thought it necessary to clarify the scope of “entity” with respect to States in this section does not necessarily mean it would have thought such clarification necessary in Sections 1324a and b. Thus, one could reasonably conclude that the reference to State government entities in 1324c’s exception does not counsel against our view as to Section 1324a.

Finally, the carve-out for State law enforcement might also 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 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. The State could not immunize the private actor’s provision of forged documents simply because the State itself is not bound by the prohibitions in 8 U.S.C. 1324c. In such a situation, the exception for “lawfully authorized investigative, protective, or intelligence activity,” 8 U.S.C. 1324a(c) would serve an important function, because that exception is broad enough to allow the State to immunize this kind of activity by a private actor.

* * *

To summarize Part I, the text of IRCA does not contain any statement that States are bound by IRCA’s prohibition against hiring unauthorized individuals, and certainly not any clear statement. In contrast, other statutes which courts have read to cover States do contain explicit statements that they apply to States. While there are textual inferences that could be drawn in either direction, ultimately the inferences do not provide clear evidence either for or against our view, and certainly nothing in them could suffice to fill the gap left by the absence of any mention of States.

II. Congress Would Have Had to Speak Clearly to Bind States in IRCA

Thus far we have analyzed the question whether IRCA governs States without reference to any clear statement rule. However, a court considering the question would almost certainly require a clear statement before concluding that Congress had dictated the State’s employment policies. Congress very likely had to speak clearly to include States within IRCA’s prohibition for two closely-related reasons. First, if IRCA applies to State government entities, 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. It would also raise Tenth Amendment concerns in at least some contexts—as if, for example, California opened its governorship to undocumented people (as it arguably already has, *see infra* Part IV, *citing* Cal. Govt. Code 1020(a)-(b)). Second, IRCA regulates employment, which is a traditional area of state control, 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 government entities in IRCA, notwithstanding the fact that the statute involves federal immigration regulation.

The Supreme Court has repeatedly held in various contexts that Congress may not regulate State governments absent clear language to that effect. For example, in 1985—the year before IRCA’s enactment—the Supreme Court held that Congress must use “unmistakably clear” language to signal its intent to abrogate State Eleventh Amendment sovereign immunity, because the Eleventh Amendment “serves to maintain” the “constitutionally mandated balance of power between the States and the Federal Government.” *Atascadero State Hosp. v. Scanlon*, 473 U.S.

234, 242 (1985) (internal citations omitted) This is a “stringent test.” *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.”).

Courts considering the question whether IRCA binds State government entities would apply that background rule of statutory construction. “[A] clear statement principle of statutory construction... applies when Congress intends to pre-empt the historic powers of the States *or* when it legislates in traditionally sensitive areas that affect the federal balance.” *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543 (2002) ((emphasis added) (internal citations omitted).

If IRCA bound State government entities, it would at the very least alter the Federal-State balance by intruding into an area of traditional State authority: the States’ power to dictate the qualifications of their own officials. A State has the “broad power to define its political community; using its definition of “political community” to determine the qualifications for State positions “rest[s] firmly within a State’s constitutional prerogatives.” *Sugarman v. Dougall*, 413 U.S. 634, 643-48 (1973). The Supreme Court has long recognized this power as foundational to the structure of the nation’s federalist system. “It 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.” *Gregory v. Ashcroft*, 501 U.S. 452, 462-63 (1991) (quoting *Taylor v. Beckham*, 178 U. S. 548, 570-571 (1900)). 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,” application of IRCA’s prohibition to at least some State employment decisions could well be unconstitutional. *Gregory*, 501 U.S. at 462-63.

Opponents of this view may argue that States’ power to dictate their employees’ qualifications is reserved only for the “most important government officials,” *Gregory*, 501 U.S. at 463; *see also Sugarman*, 413 U.S. at 647 (“[T]his power and responsibility of the State applies... to persons holding State elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.”).

Because IRCA only creates requirements for hiring employees (and certain other labor relationships), perhaps it does not trench on State prerogatives after all. *See* 8 U.S.C. 1324a (unlawful to hire an unauthorized person “for employment”); 8 C.F.R. 274a.1(h) (employment is service “performed by an employee”).⁷

But this argument ignores the fact that States have the Constitutional right to define qualifications for “government *officials*,” *Gregory*, 501 U.S. at 463 (emphasis added), and at least some such officials are undoubtedly employees. Under *Sugarman* and its progeny, the Court has defined the category of “important government officials” quite broadly, to include police officers and public school teachers—groups that are unquestionably employees. *Foley v. Connelie*, 435 U.S. 291, 300 (1978) (“Police officers very clearly fall within the category of important non-elective officers who participate directly in the execution of broad public policy.”) (internal citations omitted) (*citing Sugarman*, 413 U.S. at 647); *Ambach v. Norwick*, 441 U.S. 68, 80 (1979) (“[W]e think it clear that public school teachers come well within the “governmental function” principle recognized in *Sugarman* and *Foley*.”). Thus, if IRCA’s prohibition applied, it would limit States’ ability “to prescribe the qualifications of its *officers*,” *id.* at 462 (emphasis added), and of course their compensation as well. This would affect the federal-State balance, and therefore should not be attributed to Congress unless it has made its intention “unmistakably clear.”

Moreover, even if the States’ power to define qualifications were limited to only a small set 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 associated with interpreting IRCA to dictate what qualifications the States can employ for their highest-level officials. “[I]t 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.’” *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). That rule applies not only when a court confronts those constitutional problems in the case before it, but also when it identifies those problems in other situations that

⁷ California appears to have opened offices to people regardless of immigration status, but restricted compensation to individuals where such compensation would violate Federal law. *See* Cal. Govt. Code 1020(c) (“Notwithstanding any other law, a person appointed to civil office, regardless of citizenship or immigration status, may receive any form of compensation that the person is not otherwise prohibited from receiving pursuant to federal law.”).

could arise under the interpretation under consideration. “It 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.” *Clark v. Martinez*, 543 U.S. 371, 380 (2005).

The principle articulated in *Clark* and *Zadvydas* has particular force here, as there is no obvious way to read the language enacting IRCA’s prohibition on hiring undocumented people at 8 U.S.C. 1324a(1) and the related definitional provisions to carve out some State government officials but not others. As a textual matter, if IRCA applies to any State government entities, 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 entities. “Application of the plain statement rule thus may avoid a potential constitutional problem.” *Gregory*, 501 U.S. at 464 (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).

Opponents of the view that the clear statement standard applies may also 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. *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).

While this objection is not wholly meritless, other language in the Court’s cases on this subject suggests that the State power at issue would encompass policies that include people who would otherwise be excluded under federal law, rather than just policies that exclude people otherwise included. *See Gregory*, 501 U.S. at 462-63 (“[E]ach State has the power to prescribe

the qualifications of its officers...It is a power reserved to the States under the Tenth Amendment.”); *see also* *Ambach*, 441 U.S. at 81 (permitting US citizenship as a requirement for public school teachers because “[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”); *Bernal v. Fainter*, 467 U.S. 216, 221 (1984) (explaining that the rationale behind the *Sugarman* line of cases “is that within broad boundaries a State may establish its own form of government and limit the right to govern to those who are full-fledged members of the political community”). Ultimately, the fact that the Court’s prior cases on this issue concern limitations on the political community makes it impossible to know whether a future decision might draw such a distinction. What is clear is that doing so would not be consistent with the basic Tenth Amendment and sovereign immunity rationales underlying this area of doctrine.

The notion that the federalism principles underlying the *Sugarman* line of cases apply only to laws restricting noncitizen participation also runs contrary to a long history of State laws that defined political community more broadly than did the Federal government, particularly in the realm of voting. As many as forty states and federal territories at one point permitted noncitizens to vote. 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 preceeding an election shall be entitled to vote”). Noncitizen voting is not merely a thing of the past. For example, Maryland law permits municipalities to maintain a “supplemental list of... individuals who are not on the statewide voter registration list but who many otherwise be qualified to register to vote with the municipal corporation.” Md. Elec. Code Sec. 3-403(g). Thanks to this State law, six municipalities in Maryland permit noncitizens to vote in municipal elections. Hayduk, *supra* at 87; *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”). Similarly, the Illinois School Code permits noncitizens in Chicago to vote for local school

council members. Ill. School Code sec. 34-2.1(d)(ii) (“Eligible voters for each attendance center shall consist of the parents and community residents for that attendance center.”). Thus, States have and continue to define their political communities more inclusively than 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.

Finally, a court considering whether IRCA governs State entities would apply the clear statement rule because employment regulation is an area of traditional state control. While opponents of the application of that principle to IRCA may argue that even if States have power over employment generally, that power is limited in this area because “[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.” *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875)).

However, state hiring does not concern *immigration* as such; it concerns the State's power to employ people *already here*. In matters ancillary to the core federal power to exclude and deport, the federal courts have long recognized a role for state-level policymaking. Most importantly for present purposes, the Supreme Court held nearly fifty years ago 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 power, even though the “power to regulate immigration is unquestionably exclusively a federal power.” *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). As the Supreme Court explained in its most recent case concerning immigration federalism, “[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.” *Kansas v. Garcia*, 140 S. Ct. 791, 797 (2020) (*citing DeCanas*, 424 U.S. at 353). While Congress later displaced such state laws when it passed IRCA, that statute obviously did not change the background rule that employment regulation is a traditional matter of state concern. Thus, while Congress no doubt had authority as a general matter to enact IRCA's prohibition, 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,” *DeCanas*, 424 U.S. at 356, 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.⁸

Where Congress "legislate[s] in [a] traditionally sensitive area[] that affect[s] the federal balance," *Raygor*, 534 U.S. at 543, courts will not presume it intended to bind States unless it uses "unmistakably clear" language indicating this intention. *Atascadero*, 473 U.S. at 242. As explained above, because IRCA's prohibition does not mention States as responsible parties, its language comes nowhere near what would be required to provide such a clear statement. Therefore, it is best read to not bind States.

III. The University of California System Is Considered Part of the State and Thus Not Bound By IRCA's Prohibition

Assuming, as we have argued above, that IRCA does not bind State government entities, which institutions can open employment opportunities to undocumented individuals? The answer to that question can be found by determining which State agencies are considered part of the State for sovereign immunity purposes, which is in turn a question of State law. *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."). This memo does not attempt to answer the question as to all State entities even in California, let alone elsewhere. Here, we focus on one as to which there should be no serious dispute: the University of California is part of the State for sovereign immunity purposes.

The United States Supreme Court recognized UC's status as part of the state in 1934. *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 257 (1934) (recognizing 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."). As

⁸ Although *Garcia* correctly stated that there was no general prohibition on hiring undocumented people in the Immigration and Nationality Act as enacted in 1952, federal regulations had restricted the employment of certain noncitizens present on non-immigrant visas for several decades prior to the INA's passage. *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 later enacted in IRCA, 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.

explained below, some other California State and local government entities would be covered, while others would not be.

The Ninth Circuit has repeatedly reaffirmed that rule under its modern sovereign immunity law. Under that doctrine, whether a State agency is an arm of the State under the Eleventh Amendment “is a question of federal law [which] can be answered only after considering the provisions of state law that define the agency’s character.” *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 432 n.5 (1997). As a general matter, the five factors the Ninth Circuit considers to determine if an entity is an arm of the state are: “(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 a State entity for sovereign immunity purposes), *citing Mitchell*, 861 F.2d at 201.

The State’s legal liability is 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 in large part due to liability rules).

Applying that test, the Ninth Circuit has repeatedly reaffirmed that the University of California is protected by the State’s sovereign immunity. *See 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). *See also 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 (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). *See also* 30 Ops. 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”).

IV. No Other Legal Constraints Would Bar California Entities From Hiring Undocumented People

Although, as we have argued above, IRCA is best read to not prohibit State entities, including the University of California, from hiring undocumented people, one might reasonably ask whether any other legal constraint prohibits such hiring. We have not located any. However, three potential legal constraints—all outside IRCA—raise enough concerns that they 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.” *Martinez v. Regents of Univ. of California*, 50 Cal. 4th 1277, 1295 (2010) (*citing* 8 U.S.C. 1621(d)). That statute has been central to disputes involving other immigrant-inclusive measures. However, it does not apply here because work authorization is not a public benefit. *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”). However, Section 1621 could require the State to alter what types of employment-related benefits undocumented employees receive.

Second, although California law did in the past prohibit the hiring of undocumented people—as *DeCanas*, *supra* illustrates—California State law no longer prohibits hiring undocumented individuals. On the contrary, as of 2020, California permits undocumented people to hold appointed or elective civil office, “[n]otwithstanding any other law.” Cal. Govt. Code

1020(a)-(b). Such a person “may receive any form of compensation that the person is not otherwise prohibited from receiving pursuant to federal law.” *Id.* 1020(c). 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. *See* Cal. Labor Code 244; Cal. Bus. & Prof. Code 494.6.

Third, although the State as an employer would still have obligations to withhold wages for Social Security and Medicare, 26 U.S.C. 3101(a), and federal unemployment, 26 U.S.C. 3301, 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 ITIN holders currently pay into federal benefits programs—approximately \$5.5 billion under the Federal Insurance Contributions Act (“FICA”) in 2015—even though they are not eligible to receive those benefits without receiving a social security number.⁹ 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 benefits.

Conclusion

For all these reasons, we believe IRCA likely does not bind the States, and that California State entities, including the University of California, are free under current law to hire undocumented people.

⁹ *See* National Taxpayer Advocate, Annual Report to Congress 2015 at 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), <https://www.ssa.gov/pubs/EN-05-10096.pdf>.