No. 09-115

IN THE
Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *et al.*,
Petitioners,
v.
MICHAEL B. WHITING *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF BUSINESS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF BUSINESS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae respectfully submit this brief in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae file this brief to inform the Court of the significance of this issue to businesses, large and small, in many industries. As representatives of the business community, *amici* emphasize the substantial burdens imposed on businesses by the Legal Arizona Workers Act and scores of varying laws recently enacted in other jurisdictions.

The Associated Builders and Contractors, Inc. ("ABC") is a national construction industry trade association representing nearly 25,000 individual employers in the commercial and industrial construction industry. ABC also has 78 chapters throughout the United States.

The Human Resource Initiative for a Legal Workforce ("HR Initiative") represents the views of human resource professionals in thousands of small and large U.S. employers representing every sector of the U.S. economy. HR Initiative members (the American Council on International Personnel, HR Policy

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

Association, International Public Management Association for Human Resources, National Association of Manufacturers, and the Society for Human Resources Management) represent the front lines on employment verification and, as such, are fully committed to hiring only work-authorized individuals.

The U.S. Hispanic Chamber of Commerce ("USHCC") is the nation's largest business chamber that focuses on the needs and issues of Hispanic-owned businesses, employees and consumers. USHCC's membership includes companies and professional organizations of every size, in every industry sector, and from every region of the United States and Puerto Rico. It also serves as an umbrella organization for local, regional and statewide Hispanic chambers in the United States, Puerto Rico, Canada, Mexico, and South America.

The Chambers of Commerce of Illinois, Indiana, Kansas, Kentucky, New Jersey, and West Virginia; the Missouri Chamber of Commerce and Industry; the State Chamber of Oklahoma; the Pennsylvania Chamber of Business and Industry; the Tennessee Chamber of Commerce and Industry; the Texas Association of Business; and the Association of Washington Business are statewide organizations that are composed of and represent the interest of businesses, both large and small, as well as local chambers of commerce and other interested parties.

A brief initial word about the immigration debate underlying this case is in order. *Amici* steadfastly oppose the knowing employment of illegal immigrants. It is against federal law knowingly to em-

ploy illegal workers, and employers who violate this law are subject to an extensive (and exclusive) federal system of administration, adjudication, and penalty. The efficacy and wisdom of that choice, made by Congress nearly 25 years ago, is not at issue here. The question presented in this case instead is whether Arizona and other states and localities may make a different choice than Congress. They may not.

INTRODUCTION AND SUMMARY

In the Immigration Reform and Control Act of 1986, Congress established a uniform and comprehensive national framework governing employment verification for immigrants. Congress sought to balance the objective of preventing employment of illegal aliens with other goals, including avoiding discrimination against job applicants and limiting the burdens on employers and employees. The existence of a single nationwide system of employment verification substantially reduces the costs of compliance for employers.

The Legal Arizona Workers Act frustrates Congress's objective of establishing a uniform framework that limits the imposition of unnecessary compliance and administrative costs on employers. The severe costs and burdens occasioned by Arizona's law are exacerbated by the patchwork of overlapping and contradictory laws enacted in other jurisdictions. States and municipalities have enacted scores of laws and ordinances regulating all aspects of employment verification. Some, like the Arizona law, mandate the use of E-Verify for some or all employers. Others purport to modify the requirements of

the federal I-9 document verification program. Others create new adjudication schemes and standards, which depart from the system Congress enacted and impose harsh forms of civil and criminal sanctions on employers.

Each of these laws by itself imposes substantial costs on businesses that desire in good faith to comply with all applicable standards. Collectively, they impose an enormous financial and administrative burden on multi-state businesses, which must develop and maintain multiple, distinct compliance regimes throughout their fields of operation. This patchwork of state and local laws undermines Congress's intent to establish a comprehensive and uniform national framework that limits the imposition of undue burdens on businesses.

Even standing on its own, the Legal Arizona Workers Act imposes significant burdens on businesses that operate in Arizona. It places unique costs on businesses by imposing penalties on certain employers beyond those prescribed by federal law, and by establishing its own adjudication system to determine whether employers have hired unauthorized workers. Those penalties include the forfeiture of a business license, which can be fatal to an employer. The Arizona law also requires employers in the State to use a particular employment verification program, E-Verify, that Congress decided should be voluntary, not mandatory. Although the program continues to evolve, E-Verify remains inaccurate in certain respects and imposes continued burdens on employers. These burdens set E-Verify apart from the standard I-9 system that Congress did choose to

mandate, in part because of the limited burdens and risks it imposed on employers.

ARGUMENT

Over twenty years ago, Congress recognized that the employment of illegal aliens was a national problem requiring a national solution. In response, Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA") to create a uniform and comprehensive national employment verification framework. *See* Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. §§ 1324a, 1324b). The IRCA, as amended through subsequent statutes, *e.g.*, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, establishes a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

Congress fashioned this "comprehensive scheme" in a manner sensitive to several competing considerations. In particular, Congress's sensitivity to the burden on employers pervaded its deliberations. *See Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) ("[T]he legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process."). As a result of Congress's concerns for the interests of businesses, it ultimately adopted a framework that is "fair to decent and honest employers, but at the same time, ensure[s] that repeat offenders will be subject to strong civil and criminal penalties." 132 Cong. Rec. H10,584 (daily ed. Oct. 15, 1986) (statement of Rep. Rodino).

The Legal Arizona Workers Act and other analogous state and local laws interfere with Congress's establishment of a comprehensive and uniform employment verification framework. Contrary to Congress's wishes, Arizona's law places substantial costs on businesses by imposing additional sanctions above those permitted under federal law and by mandating use of the E-Verify program—which Congress deliberately specified should be voluntary. The burdens imposed on businesses are magnified many times over by the patchwork of new immigration provisions enacted by states and municipalities in recent years. The competing and inconsistent requirements undermine Congress's intent to establish a uniform and comprehensive framework that would avoid unduly burdening American businesses.

A. IRCA REFLECTS A CAREFUL BALANCING OF INTERESTS, INCLUDING AVOIDING THE IMPOSITION OF AN UNDUE BURDEN ON EMPLOYERS

IRCA was the culmination of a lengthy legislative process. *See* H.R. Rep. No. 99-682, pt. 1, at 52-56 (1986) (discussing the 15-year legislative process resulting in IRCA); S. Rep. No. 99-132, at 18-26 (1985). Upon signing IRCA into law, President Reagan called it "the product of one of the longest and most difficult legislative undertakings in recent memory." Statement of the President Upon Signing S. 1200, Nov. 10, 1986.

1. In the period leading up to IRCA's enactment, Congress encountered substantial concerns about making employer sanctions the cornerstone of immigration reform. A wide range of business and civil

rights organizations initially opposed the imposition of sanctions on employers for hiring unauthorized workers. *See* S. Hrg. 98-198, at 69-70, 296, 368-69; S. Hrg. 99-273, at 60-61, 343. Opponents believed that employer sanctions unfairly imposed the burden on employers for the government's failure to protect the border. *See, e.g.*, 130 Cong. Rec. H5707 (daily ed. June 13, 1984) (statement of Rep. Edwards) (wrong to place "the responsibility for resolving the illegal alien problem on the shoulders of the American employer, rather than on the Federal Government where it belongs"). Opponents also feared that "employer sanctions are an attempt to make immigration officials of all of our Nation's employers, all 5 million of them, a job for which they have no training or expertise and for which they should not have to use their limited resources." *Id.*

The business community expressed concerns that national companies would be punished for transgressions of a single subdivision, and that stiff monetary fines could put many small businesses completely out of business. *See* Testimony of Jerry Jasinowski, on behalf of the National Association of Manufacturers, S. Hrg. 99-273, at 287. Members of Congress acknowledged that there were a limited number of companies and industries known for hiring unauthorized aliens. They thus expressed concern that, instead of targeting these repeat offenders, new legislation might impose substantial burdens in a blanket fashion on all employers. *See* 130 Cong. Rec. H5709 (daily ed. June 13, 1984) (statement of Rep. Schroeder).

Opponents also feared that employer sanctions might cause employers to relocate their business op-

erations abroad, harming American workers and the American economy. *See, e.g.*, 130 Cong. Rec. H5707 (statement of Rep. Edwards) ("This country already faces capital and job flight overseas to other countries. Under employment sanctions, surely this will only increase."); S. Hrg. 99-273, at 44, Testimony of Dr. Barry Chiswick, Hoover Institution ("Employer sanctions are the equivalent of an employment tax" that "may further worsen the job opportunities of low-skilled workers legally in the United States, particularly youths and minorities."). Opponents additionally expressed concerns that employer sanctions could provoke discrimination against US citizens and legal aliens of foreign origin based on perceived national origin:

> The employers of America are going to be placed under undue hardship. They will be watched very carefully. There are people with businesses in Wichita, KS; in New York City; in San Diego, CA, and Portland, ME. They will be scrutinized and asked to fill out forms. They are going to have no understanding of why they are doing this. I would like to tell the employers of America that in their search to make sure that they abide by the law that they please not turn away people who look different or sound different.

130 Cong. Rec. H5713 (statement of Rep. Garcia).

2. Congress sought to address those various concerns in the provisions of IRCA. In particular, Congress intended IRCA to be the "least disruptive to the American businessman . . . [while] also minimiz[ing] the possibility of employment discrimina-

tion." H.R. Rep. No. 99-682, pt. 1, at 56; S. Rep. No. 99-132, at 8-9 (same). Congress accordingly established protections for employers who act in good faith and for small businesses. For example, Congress prescribed an affirmative defense for employers who attempt in good faith to comply with IRCA's document verification requirements. *See* 8 U.S.C. § 1324a(a)(3), (b)(1)(A), (b)(6). Additionally, Congress ensured that employers would not bear responsibility for verifying the authenticity of employment authorization documents: employers are deemed to have complied with the IRCA requirements as long as a document "reasonably appears on its face to be genuine." 8 U.S.C. § 1324a(a)(3), (b)(1); *see* S. Rep. No. 99-132, at 10-12, 32 (1985); H.R. Rep. No. 99-682, pt. 1, at 52-56, 60-62.

Further, Congress carefully calibrated the penalties to be imposed on employers for employing unauthorized workers. 8 U.S.C. § 1324a(e)(4). First-time violators are subject to a monetary fine, penalties increase for second and subsequent violations, and employers engaged a "pattern or practice" of violations are subject to criminal fines and potential imprisonment. *Id.*; *id.* § 1324a(f). Congress further provided that, in determining the amount of a monetary penalty, an administrative law judge shall consider "the size of the business of the employer being charged." *Id.* § 1324a(e)(5). And Congress prescribed that, in cases of large corporations with separate subdivisions, penalties shall be imposed only on "distinct, physically separate subdivisions." *Id.* § 1324a(e)(4)(B). Additionally, Congress required the GAO to prepare a report to determine whether "an unnecessary regulatory burden has been created

for employers," IRCA § 101(j), and established a joint taskforce to review this and other reports and make follow-up recommendations, *id.* § 101(k).

Finally, Congress sought to allay concerns that the enactment of employer sanctions would give rise to discrimination against job applicants based on their perceived nationality. Congress included provisions expressly prohibiting employment discrimination based on national origin or citizenship status. *See* IRCA § 102 (enacting 8 U.S.C. § 1324b). Congress also provided victims of discrimination with the right to file charges, 8 U.S.C. §§ 1324b(b), (d)(2), and established a graduated schedule of penalties on employers for discrimination paralleling the penalties for employing unauthorized workers, *see* IRCA § 102 (enacting 8 U.S.C. § 1324b(g)(2)(B)).

B. THE PATCHWORK OF STATE AND LOCAL LAWS ADDRESSING EMPLOYMENT OF IMMIGRANTS, INCLUDING ARIZONA'S LAW, PLACES SIGNIFICANT BURDENS AND COSTS ON BUSINESS

While the Legal Arizona Workers Act itself imposes significant costs on businesses that operate in the state, Arizona's law is but one example of a growing multitude of similar efforts by states and localities to establish their own rules governing verification of immigrants' employment eligibility. States and cities have modified the federal electronic or document verification requirements, developed their own adjudication and enforcement mechanisms, and imposed their own sanctions and penalties. Each one of these laws imposes concrete burdens on businesses that operate in the jurisdiction. Those bur-

dens are particularly magnified for multi-state business subject to the patchwork of conflicting and costly standards and requirements. The result is to thoroughly undermine Congress's objective in IRCA to establish a uniform, nationwide system that would be "least disruptive to the American businessman." H.R. Rep. No. 99-682, pt. 1, at 56.

1. a. In recent years, state legislatures have enacted a growing deluge of laws regulating various aspects of immigration. The National Conference of State Legislatures ("NCSL") has prepared yearly reports collecting and cataloguing the laws. Those studies demonstrate the quantity and breadth of the new laws. According to the NCSL 2010 Report[2]:

- In 2005, 300 immigration-related bills were introduced and 38 laws were enacted.
- In 2006, activity doubled: 570 bills were introduced and 84 laws were enacted.
- In 2007, activity tripled: 1,562 bills were introduced and 240 laws were enacted.
- In 2008, activity remained at this high level: 1305 bills were considered and 206 were enacted.
- In 2009, more than 1,500 bills were introduced, 222 laws were enacted, and 131 resolutions adopted.

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[2] NCSL Immigrant Policy Project, 2010 Immigration-Related Laws and Resolutions in the States (rev. July 20, 2010), *available at* http://www.ncsl.org/default.aspx?TabId=20881.

- And in the *first half* of 2010 alone, 1,374 bills and resolutions were introduced, and state legislatures passed 191 laws and adopted 128 resolutions. In addition, during this period "every state in regular session considered laws related to immigrants or immigration."

These newly enacted state and local laws cover a number of topics relating to immigration, ranging from law enforcement to identification to education and benefits. But in each of these recent years, laws regulating employment of immigrants number among the most frequently introduced and enacted. *See, e.g.*, NCSL 2008 Report[3] at 1 (stating that "[a]s in recent years, the top three areas of interest are identification/driver's licenses, employment and law enforcement"). Thus, according the NCSL, 244 employer-related immigration bills were introduced in 45 states in 2007, and 20 states enacted legislation. NCSL 2007 Report[4] at 2, 7-10. In 2008, 13 states enacted 19 more employer-related immigration laws. NCSL 2008 Report, *supra*, at 5-8. And in 2009, 12 states enacted 21 employment related laws, and 6 more laws were vetoed. *See* NCSL 2009 Report.[5]

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[3] NCSL Immigrant Policy Project, State Laws Related to Immigrants and Immigration in 2008 (rev. Jan. 27, 2009), *available at* http://www.ncsl.org/Portals/1/documents/immig/StateImmigReportFinal2008.pdf.

[4] NCSL Immigrant Policy Project, 2007 Enacted State Legislation Related to Immigrants and Immigration (rev. Jan. 31, 2008), *available at* http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf.

[5] NCSL Immigrant Policy Project, 2009 State Laws Related to Immigrants and Immigration January 1—December 31,

Those totals do not even include municipal ordinances or state resolutions.

b. This patchwork of immigration employment laws, which impose a variety of requirements inconsistent with those authorized by Congress, defies easy categorization. The different nature of these mandates, as much as their increasing prevalence, imposes just the sort of costly compliance burdens that Congress intended to prevent when it implemented a national system. These include:

* *Requiring certain employers to use E-Verify.* As explained in more detail below, Arizona's law explicitly requires employers to use E-Verify, even though Congress deliberately made the program voluntary. A number of other States and local jurisdictions have enacted provisions that likewise govern employers' use of E-Verify. Mississippi and Utah also explicitly require employers to use the program.[6] Colorado, Minnesota, Missouri, Georgia, Rhode Island, and certain municipalities explicitly or effectively require state contractors to participate in the program.[7]

2009 (rev. Dec. 1, 2009), *available at* http://www.ncsl.org/default.aspx?tabid=19232.

[6] Miss. Code Ann. § 71-11-3; Utah Code Ann. § 13-47-201.

[7] *See* Colo. Rev. Stat. §§ 8-17.5-101(3.3), 8-17.5-102(1), (5)(c)(I)–(III); Minn. Exec. Order 08-01 (Jan. 7, 2008); Mo. Rev. Stat. §§ 285.525(6), 285.530(2); Ga. Code Ann. § 13-10-91(b); R.I. Exec. Order 08-01 (Mar. 27, 2008); S.C. H.B. 4400 §§ 3, 19 (codified at S.C. Code Ann. §§ 41-8-20(B)(1), 8-14-10(A)(4), 8-14-20(B)(1)); Ordinance No. 2006-18 § 4(D) (Hazelton, Pa.); Ordinance No. 2006-005 § 4(D) (Bridgeport, Pa.); Ordinance No. 1736 § 4(D) (Valley Park, Mo.); Resolution No. 2006-R-106 (Cherokee Cnty., Ga.); Ordinance No. 07-02 § 23.D.13 (Dorchester Cnty., S.C.); Ordinance No. 07-260 (Mission Viejo, Cal.).

Virginia will require all of its agencies to use E-Verify beginning in 2010.[8] Other states, such as Oklahoma, require certain employers to use a state-created employment verification system.[9] Illinois, in direct contrast, forbade employers in the state from using E-Verify, *see* 820 Ill. Comp. Stat. 55/12, but a court has held that federal law preempted that ban, *see United States v. Illinois*, No. 07-3261, 2009 WL 662703 (C.D. Ill. Mar. 12, 2009). Relatedly, the California legislature recently passed, and the Governor vetoed, a bill that would have prohibited the use of E-Verify except when required by federal law. *See* Cal. AB 1288 (vetoed Oct. 11, 2009).

* *Overriding the federal I-9 document verification system.* Still other jurisdictions effectively override the federal I-9 document verification system by altering the numbers and types of documents required, or the scope of employees covered. Tennessee and Louisiana regulate the number and types of documents employers can use to verify work authorization status.[10] Georgia and South Carolina impose special tax withholding requirements on employers who fail to collect additional information from employees beyond that required in the federal I-9 employment verification process.[11] South Carolina requires some private businesses who do not use E-Verify to hire only those employees who meet the

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[8] Va. Code Ann. § 40.1-11.2.

[9] Okla. Stat. tit. 25, §§ 1312, 1313(B)(2).

[10] Tenn. Code Ann. § 50-1-106; La. Rev. Stat. Ann. § 23:992.2.

[11] Ga. Code Ann. § 48-7-101(i); S.C. H.B. 4400 § 8 (codified at S.C. Code Ann. § 12-8-595(A)–(B)).

state's driver license eligibility requirements. 2008 S.C. Laws Act 280 (H.B. 4400) § 19 (codified at S.C. Code Ann. § 41-8-20(B)(2)(b)–(c), (C)). And Oklahoma's law effectively requires an employer to verify the employment eligibility of a non-employee independent contractor, Okla. Stat. tit. 68, § 2385.32, even though federal law excludes contractors from the I-9 process, *see* 8 C.F.R. § 274a.1(f)–(g). Hazleton, Pennsylvania likewise attempted to require document verification for independent contractors. *See Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 526 (M.D. Pa. 2007).

* *Authorizing state officials to adjudicate employer compliance under altered standards*. In addition to imposing document or electronic verification requirements on employers that depart from those prescribed by federal law, certain recently enacted statutes instruct state officials to make their own independent evaluations about an employer's compliance. The challenged Arizona law allows a state judge to determine whether employers have violated the hiring prohibition. Ariz. Rev. Stat. § 23-212(A). Oklahoma subjects employers to the state administrative machinery that attends charges of discrimination. *See* Okla. Stat. tit. 25, § 1313(C). Those types of provisions conflict with the elaborate administrative review system enacted by Congress to determine whether an employer knowingly employed an illegal alien. *See* 8 U.S.C. § 1324a(e)(3); 28 C.F.R. pt. 68. Moreover, whereas the IRCA permits federal sanctions only if an employer "knowingly" hires an unauthorized alien, State and local laws have lowered the scienter requirement, sometimes permitting employers to be held liable based on a standard of

mere "reckless[ness]"[12] or "negligence,"[13] or even strict liability.[14]

* *Imposing additional penalties and sanctions.* A number of states impose a range of additional penalties on employers, beyond those authorized by federal law. Some jurisdictions allow civil and criminal penalties, including fines and even imprisonment, for employers they find to have hired illegal immigrants.[15] Other states have created new types of legal liability for employers through the tort system. Oklahoma, for example, subjects employers to a discrimination claim on behalf of any discharged employee if the employer "reasonably should have known" that a retained employee is an unauthorized alien. Okla. Stat. tit. 25, § 1313(C). Louisiana, Mississippi, South Carolina, Utah, and certain municipalities have created similar tort claims.[16] Arizona,

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[12] Miss. S.B. 2988 § 2(8)(c)(i), Reg. Session (2008).

[13] Utah Code Ann. § 63G-11-103(4)(a)(i).

[14] La. Rev. Stat. Ann. § 23:992; Ordinance No. 2006-18 § 4(A) (Hazelton, Pa.); Ordinance No. 2006-005 § 4(A) (Bridgeport, Pa.); Ordinance No. 07-02 § 23.C (Dorchester Cnty., S.C.). Hazelton amended its ordinance after it was attacked in litigation. Ordinance No. 2007-6 (Hazelton, Pa.); *see Lozano*, 496 F. Supp. 2d at 484-85 & n.2. But strict liability regimes remain in force in Louisiana, Bridgeport, and Dorchester County.

[15] La. Rev. Stat. Ann. § 23:993; W. Va. Code § 21-1B-5; Local Law No. 52-2006 § 8 (Suffolk County, N.Y.).

[16] La. Rev. Stat. Ann. § 23:994; Miss. S.B. 2988 § 2(4)(d); S.C. H.B. 4400 § 12 (codified at S.C. Code Ann. § 41-1-30); Utah Code Ann. § 63G-11-103(4); Ordinance No. 2006-18 § 4(E)(2) (Hazelton, Pa.); Ordinance No. 2006-005 § 4(E)(2) (Bridgeport, Pa.). Still additional jurisdictions threaten either direct or tort liability on businesses not using Basic Pilot. *See* Ga. Code Ann. § 48-7-21.1(b)–(c)(1); Miss. S.B. 2988 § 2(4)(d)–(e); S.C. H.B.

along with other states, including Hawaii, punishes violations through suspension or revocation of a business's "licenses," including withdrawal of its charter.[17] And Colorado, Georgia, Missouri, and South Carolina bar businesses from deducting wages paid to known unauthorized workers as a business expense on state income tax forms.[18]

2. a. The rash of new laws places significant administrative, compliance, and punitive costs on businesses. To begin with, the patchwork of laws causes considerable confusion for employers and employees alike. It is difficult enough for businesses to stay informed of the steady flow of new legal requirements, let alone to develop compliance programs that keep pace with the unpredictable and ever-changing legal landscape.

Moreover, the range of distinct verification regimes in different jurisdictions imposes substantial administrative costs on businesses, particularly on human resources and legal offices. At a minimum, businesses must devote significant resources to monitor, understand, and attempt to comply with these laws. They must hire and train human re-

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4400 §§ 12, 19 (codified at S.C. Code Ann. §§ 12-6-1175(B), (F) (tax), 41-1-30(A), (E) (tort), 41-8-20, -30, -40 (direct)); Utah Code Ann. § 63G-11-103(4)(a)–(b); Ordinance No. 07-02 §§ 23.C, 23.D.5 (Dorchester County, S.C.).

[17] *See* Ariz. Rev. Stat. § 23-212; *see also, e.g.*, Miss. Code Ann. § 71-11-3(7)(e); Mo. Rev. Stat. §§ 285.525, 285.535; W. Va. Code § 21-1B-7; Hawaii H.B. 2897 (enacted June 30, 2010).

[18] Colo. Rev. Stat. § 39-22-529(2); Ga. Code Ann. § 48-7-21.1(b); Mo. Rev. Stat. § 285.535(14); S.C. Code Ann. § 12-6-1175(B).

sources professionals in different jurisdictions. And when businesses are unable to adapt their verification systems to a new law in any given state, they face harsh sanctions and penalties, even if they remain in full compliance with federal law. As one human resources organization testified to Congress, "it is becoming impossible for employers with presence in several states to keep in compliance with the various requirements."[19] Of course, employers all the while must abide by the IRCA and its implementing regulations, in addition to the patchwork of state and local requirements.

Consider, as an example, the burdens that laws like Arizona's place on a company like Walmart. Walmart operates more than 4,300 facilities in the United States, in all 50 states and thousands of cities and towns.[20] In Arizona alone, the company has over 100 stores and 31,000 employees.[21] Walmart prides itself on recruiting a diverse workforce: for instance, over 171,000 Hispanic employees work for the company. The scale of Walmart's human re-

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[19] Statement of the Human Resource Initiative for a Legal Workforce Submitted to the H. Jud. Comm. Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law at 8 (June 10, 2008), *available at* http://www.legalworkforce.org/sites/default/files/House%20Immigration%20Subcommittee.pdf.

[20] *See* Walmart Corporate Fact Sheet, *available at http://walmartstores.com/pressroom/FactSheets/*. Walmart State-by-state Information, *available at* http://walmartstores.com/pressroom/StateByState/.

[21] *See* Walmart State-by-state Information on Arizona, http://walmartstores.com/pressroom/StateByState/State.aspx?st=AZ.

sources processes is staggering: it received more than 13 million job applications in 2008 alone.[22] Complying with federal law while processing millions of applications and seeking to hire a diverse workforce already poses significant challenges. Compliance becomes exponentially more costly and burdensome when one takes into account the additional conflicting and complex state and local requirements in the various jurisdictions in which Walmart operates. Any business that hires employees in multiple jurisdictions will face similar problems. And even small business that hire employees in just one location will still be forced to comply with both federal and state and local requirements.

b. Because Arizona's law is part of this larger patchwork, the Court should consider this case in the context of the full range of state and local regulations. Permitting Arizona's law to remain standing could encourage other jurisdictions to enact still further employment verification regulations. The cumulative effect of all of those laws places substantial burdens on employers' ability to hire new employees and a diverse workforce. By contrast, because Arizona's law is among the most extreme of the state and local laws, and because many of those laws were enacted only recently—and in some cases have yet to take effect—the Court, by holding Arizona's law preempted, can address the growing group of state and local laws before it becomes even more burdensome.

Indeed, this Court has emphasized the need to maintain that sort of global perspective when con-

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[22] *See* Walmart Diversity Page, http://walmartstores.com/Diversity/299.aspx.

sidering a preemption challenge. In *Rowe v. New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989 (2008), the Court held that Maine's effort to establish rules affecting the shipment of tobacco products in the State was preempted by federal law (the Federal Aviation Administration Authorization Act of 1994). In finding the Maine law preempted, the Court explained that "allow[ing] Maine to insist that the carriers provide a special checking system would allow other States to do the same." 128 S. Ct. at 996. And a decision that "federal law . . . permit[s] these, and similar, state requirements could easily lead to a patchwork of state . . . laws, rules, and regulations." *Id.* In *Rowe*, the Court considered "[t]hat state regulatory patchwork [to be] inconsistent with Congress' major legislative effort." *Id.; see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (considering the consequences of "50 States' tort regimes"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (considering the "prospect" of action by "all 50 States").

Here, likewise, the Court should approach this case with the understanding that upholding Arizona's law "could easily lead to a patchwork of state" and local laws. Indeed, that "regulatory patchwork" has already become a reality, one that places significant and growing burdens and penalties on businesses that endeavor in good faith to comply with federal law.

C. THE ARIZONA STATUTE SUBJECTS BUSINESSES TO HARSH PENALTIES AND BURDENSOME REQUIREMENTS

1. The Employer Sanctions Provision Unduly Punishes Businesses

The Arizona statute establishes an independent, state prohibition against hiring unauthorized aliens, which it enforces with penalties that "are far more severe than those authorized under federal law." U.S. Br. in Support of Cert. at 14; *see also* Ariz. Rev. Stat. § 23-212. The statute's sanctions can be highly burdensome—and potentially debilitating—for businesses.

The punitive nature of the sanctions is self-evident and requires no extended elaboration. An employer's first violation of the statue results in the imposition of a mandatory probationary period, during which the business must file quarterly reports for each and every new employee it hires; the state court may also order the suspension, for a ten-day period, of the employer's "licenses"—which the Act defines broadly to include charters, articles of incorporation, and other foundational documents. *Id.* §§ 23-212(F)(1), 23-211(9). The penalty for a second violation is the permanent and immediate revocation of the employer's business licenses at the location where the unauthorized alien worked, or—if the employer has no license specific to that location—at the employer's primary place of business. *Id.* § 23-212(F)(2). The practical effect of that punitive sanction, accurately deemed the "business death penalty" by Arizona's then-governor, Pet. 9, is to end the very existence of some businesses.

2. Arizona's E-Verify Requirement Burdens Businesses With the Expense and Delay of Employment Verification Procedures Distinct From the Federal Requirements

The Arizona law's requirement that "every employer" in the state use E-Verify encumbers employers with additional costs and burdens. *See* Ariz. Rev. Stat. § 23-214(A). Congress created E-Verify (then known as the "Basic Pilot Program") as one of three voluntary and experimental employment verification programs to supplement the standard federal I-9 document verification system. *See* 8 U.S.C. § 1324a note. From the outset, Congress prescribed that employer participation in E-Verify be strictly voluntary. *See* IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, § 402(a) (1996) ("the Attorney General *may not require* any person or other entity to participate in" E-Verify) (emphasis added); *see also id.* § 402(d)(2), (3)(A) (repeatedly noting the "voluntary nature" of the program). Moreover, as Congress has continued to study E-Verify, it has repeatedly declined to require private employers to use the program. *See*, *e.g.*, H.R. 98, 110th Cong. § 5(a) (2007); H.R. 1951, 110th Cong. § 3 (2007); *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse, Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (June 10, 2008).[23] Congress has

[23] Certain federal agencies recently promulgated a regulation mandating the use of E-Verify by certain federal contractors and sub-contractors. Federal Acquisition Regulation, 73 Fed. Reg. 67,651 (Nov. 14, 2008) (codified at 48 C.F.R. pts. 2,

kept E-Verify strictly voluntary for good reason: while the program continues to evolve and improve, it imposes significant burdens on employers.

a. Employers who participate in E-Verify must use the Internet to check their employees against a federal database of presumably valid Social Security numbers. *See* Expansion of the Basic Pilot Program, 69 Fed. Reg. 75,997, 75,998 (Dec. 20, 2004); E-Verify Memorandum of Understanding ("MOU"), *available at* http://www.uscis.gov/files/nativedocuments/MOU.pdf. Many employees cannot be immediately confirmed as work-authorized because the information their employer enters into the system fails to match records contained in the federal database. *See Employment Verification—Challenges Exist in Implementing a Mandatory Electronic Employment Verification System: Hearing Before the Subcomm. on Social Security, H. Comm. on Ways & Means*, 110th Cong. 4 (2008) (statement of Richard M. Stana, Government Accountability Office) ("GAO Testimony"). For any employee whom the database—and, in the case of non-citizens, an immigration official—fails to clear, E-Verify provides a "tentative nonconfirmation" of work authorization status. Westat, *Findings of the E-Verify Program Evaluation* xxv (2009), *available at*

22, 52). The rule, however, requires the use of E-Verify only for those private employers who voluntarily choose to contract with the federal government. *See* U.S. Br. in Support of Cert. 18-19 n.10. Nor does the rule authorize states to require E-Verify in any circumstances. To the contrary, the rule's narrow application only underscores that E-Verify is voluntary except where explicitly made mandatory.

http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.

A recent, government-commissioned study determined that over four percent of E-Verify's results are inaccurate. *Id.* at xxx (reporting a total inaccuracy rate of 4.1 percent). The Social Security Administration ("SSA") has acknowledged that its "Numident" file—one of the databases on which E-Verify relies—contains inaccuracies that could result in the communication of incorrect work authorization information to employers on a substantial scale. *See* Office of the Inspector General, Social Security Administration, *Congressional Response Report: Accuracy of The Social Security Administration's Numident File* ii (2006), *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf. After reviewing a sample of its records, the agency estimated that over four percent of its files—or 17.8 million records—could result in "incorrect feedback" when submitted through E-Verify. *Id.*

The error rate in E-Verify is particularly acute for foreign-born employees. Because the SSA does not automatically update the citizenship status of aliens who become naturalized citizens, as many as 3.3 million non-U.S. citizen records contain out-of-date citizenship status information, a significant problem that has caused the agency itself to express concern about "the extent of incorrect citizenship information" in the Numident file. *See id.* Because E-Verify relies in part on the SSA's database, naturalized, work-authorized citizens with outdated SSA files may erroneously receive a temporary nonconfirmation, potentially requiring them to contact the United States Citizenship and Immigration Service

("USCIS") or travel to an SSA field office to correct their records. *See* GAO Testimony, *supra*, at 13; *see also* Westat, *Findings of the E-Verify Program Evaluation*, *supra*, at 212-13. In the end, foreign-born, work-authorized employees—whether naturalized citizens or work-authorized non-citizens—are more than 20 times more likely to receive an erroneous tentative nonconfirmation than someone born in the United States. *See id.* at xxxv.

E-Verify also produces erroneous results in the converse direction, mistakenly designating unauthorized workers to be authorized. Indeed, the same recent study estimated that E-Verify's inaccuracy rate for unauthorized workers exceeds 50 percent, with more than half of unauthorized workers mistakenly deemed authorized. *Id.* at xxx-xxxi. These false positives give employers little assurance that E-Verify will result in an authorized workforce, and can seriously disrupt employers' operations if employees whom E-Verify erroneously cleared are later discovered to be unauthorized. *See Problems in the Current Employment Verification and Worksite Enforcement System: Hearing Before the H. Subcomm. on Immigration*, 110th Cong. 35-37 (2007) (testimony of John Shandley, Swift & Company) (government raids detained 1,282 employees despite company's longstanding use of E-Verify, disrupting its operations and costing the company more than $30 million).

Additionally, E-Verify's operation can inject uncertainty and delay into employers' investments in hiring and training of new employees. In the case of an employee who receives a tentative nonconfirmation result, E-Verify's rules prohibit taking an ad-

verse action against the employee for eight days in order to allow the employee to contest the result with the federal government. *See* Westat, *Findings of the E-Verify Program Evaluation*, *supra*, at 7. The employer must further suspend action during a subsequent period "while SSA or [DHS] is processing the verification request." MOU at ¶¶ II.C.10. While resolution of the tentative nonconfirmation result remains pending, the employer cannot withhold training from the employee or adjust the employee's assignments. Westat, *Findings of the E-Verify Program Evaluation*, *supra*, at 7.

Even when it operates without flaws, E-Verify exacts a financial toll on businesses, who must acquire, set up, and maintain computer systems, and train personnel in the program. *Id.* at 182-84. Those burdens are particularly pronounced for small businesses, who may lack the means to adequately staff and maintain the program, and who may find themselves at risk of noncompliance and incurring the resulting substantial penalties.

b. The burdens associated with E-Verify stand in contrast to the employment verification system Congress *did* mandate—the standard federal I-9 process—which carefully limits employers' verification responsibilities. Under the paper-based, I-9 system established by IRCA, employers examine specified documents to determine whether a prospective employee is authorized to work in the United States. 8 U.S.C. § 1324a(b). As long as those documents reasonably appear on their face to be genuine, the employer has satisfied its burden; indeed, the employer must accept the documents and cannot ask for addi-

tional or different ones. *See* 8 U.S.C. §§ 1324a(b), 1324b(a)(6).

The costs and burdens attendant to mandatory E-Verify participation are inconsistent with the choice Congress made when it required employers to participate in the I-9 process. Congress's decision to impose a verification system that limits the burden and risk for employers reflects a desire to constrain the employment of illegal aliens in a manner "least disruptive to the American businessman." H.R. Rep. No. 99-682, pt. 1, at 56. When it came to determining what type of employment verification process to impose, Congress accordingly emphasized that "it is not expected that employers ascertain the legitimacy of documents presented during the verification process." *Id.* at 61; *see also Collins Foods Int'l, Inc. v. I.N.S.*, 948 F.2d 549, 554 (9th Cir. 1991) ("Congress did not intend the statute to cause employers to become experts in identifying and examining a prospective employee's authorization documents."). Requiring employers to use E-Verify runs counter to that congressional choice.

It is possible that continued improvements and modifications to E-Verify could ameliorate the burdens it imposes on businesses to an extent warranting its mandatory and widespread use. But that is a judgment for Congress to make, not for each individual state and municipality.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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