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 U.S. Court of Appeals for the Ninth Circuit

BRIEF FOR EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

Lawrence J. Joseph
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel (202) 669-5135
Fax (202) 318-2254
Email lj@larryjoseph.com

QUESTIONS PRESENTED

1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that expressly preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens. 8 U.S.C. §1324a(h)(2).

2. Whether the Arizona statute is impliedly preempted because it undermines the comprehensive scheme that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147 (2002).

3. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. §1324a note.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is a nonprofit organization founded in 1981. From its inception, Eagle Forum ELDF has defended American sovereignty and promoted adherence to

[1] This *amicus* brief is filed with written consent of all parties; the written letters of consent from petitioners and respondents have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief and no counsel for a party authored this brief in whole or in part, nor did any person or entity other than *amicus*, its members, and its counsel make a monetary contribution to the preparation or submission of this brief.

the U.S. Constitution; repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States; consistently stood in favor of enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens; and defended federalism, including the ability of state and local government to protect their communities and to maintain order. For these reasons, Eagle Forum ELDF has a direct and vital interest in the issues before this Court.

LEGAL AND FACTUAL BACKGROUND

The Chamber of Commerce ("Chamber") and Hispanic groups and individuals (collectively, "Plaintiffs") bring this facial challenge to the Legal Arizona Workers Act, ARIZ. REV. STAT. §§23-211 to -216 ("LAWA"). Under the circumstances, the only relevant "facts" are LAWA's text and the corresponding provisions of federal law that Plaintiffs claim preempts LAWA.

The Immigration Reform & Control Act of 1986 ("IRCA") provides federal civil and criminal procedures and sanctions for employing or recruiting "unauthorized aliens" and expressly preempts state and local sanctions for those activities "other than through licensing and similar laws." 8 U.S.C. §1324a(h)(2). Its legislative history states that:

> [IRCA was] not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation … [or] licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws,

> which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. REP. NO. 99-682(I), at 58, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. Thus, both IRCA's plain language and legislative history preserve state and local authority over licensing and similar laws, including "fitness to do business" laws.

"Numerous witnesses … expressed their deep concern that the imposition of employer sanctions" would make employers "extremely reluctant to hire persons because of their linguistic or physical characteristics." H.R. REP. NO. 99-682(I), at 68, *reprinted in* 1986 U.S.C.C.A.N., at 5672. Although "[t]he [House Judiciary] Committee d[id] not share the view that wholesale employment discrimination will necessarily result from the enactment of sanctions," "the Committee d[id] believe that every effort must be taken to minimize the potentiality of discrimination and that a mechanism to remedy any discrimination that does occur must be a part of this legislation." *Id.* Accordingly, in addition to providing sanctions for employing "unauthorized aliens," IRCA also made it "an unfair immigration-related employment practice … to discriminate against any individual (other than an unauthorized alien…) with respect to the hiring … of the individual for employment or the discharging of the individual from employment … because of such individual's national origin, or … [in some circumstances] because of such individual's citizenship status." 8 U.S.C. §1324b(a)(1).

The federal E-Verify program originated as one of the pilot programs on "employment eligibility confirmation" that the Illegal Immigration Reform &

Immigrant Responsibility Act of 1996 ("IIRIRA"), PUB. L. NO. 104-208, Div. C, §401(a), 110 Stat. 3009-546, -655, directed the responsible federal agency (then the Department of Justice, now the Department of Homeland Security) to implement. Although originally only a temporary program for a limited number of states, *Id.,* §401(b)-(c), 110 Stat. 3009-655-56, Congress consistently extended and expanded the E-Verify program. *See, e.g.,* Department of Homeland Security Appropriations Act, PUB. L. NO. 111-83, §547, 123 Stat 2142, 2177 (2009) (extending E-Verify through 2012); Basic Pilot Program Extension & Expansion Act of 2003, PUB. L. NO. 108-156, 117 Stat. 1944 (2003) (making E-Verify available in all fifty States). Employers who use E-Verify establish a rebuttable presumption that they have not violated IRCA. IIRIRA §402(b)(1), 110 Stat. 3009-656-57. Although it mandates E-Verify for federal agencies, their contractors, and certain IRCA violators, IIRIRA §402(e), 110 Stat. 3009-658; 48 C.F.R. §§22.1800-.1802, federal law does not mandate E-Verify for other employers.

Plaintiffs challenge two components of LAWA: (1) a licensing sanction that applies to employers found to have knowingly employed unauthorized aliens, ARIZ. REV. STAT. §§23-212-.212.01, and (2) a mandate that employers use the E-Verify program or its successors to verify employees' employment eligibility, *id.,* §§23-211(5), -214. In enforcing the licensing sanction, state officers must obtain a federal determination of an alien's work authorization under 8 U.S.C. §1373(c), without making their own final determination. ARIZ. REV. STAT. §§23-212(B), -212.01(B). The licensing sanction applies less stringently to first-time violations

(suspension of licenses) than second violations (permanent revocation of licenses). *Compare id.,* §23-212(F)(1)(c) *with id.,* §23-212(F)(2). With certain exceptions, LAWA defines licenses as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state," *Id.,* §23-211(9)(a), including articles of incorporation and certificates of partnership. *Id.,* §23-211(9)(b)(i)-(ii).

SUMMARY OF ARGUMENT

Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica,* 424 U.S. 351, 354 (1976), this Court has never held that every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). Instead, preemption hinges on what the state or local statute does and how it fits within the federal regulation of immigration. Here, neither federal immigration law nor the Constitution preempts Arizona's licensing sanction or its E-Verify mandate.

Plaintiffs lack standing to challenge LAWA's licensing sanction because neither any Plaintiff nor any identified member of a Plaintiff organization faces a sufficiently imminent injury to meet Article III's case-or-controversy requirement (Section I). By contrast, it appears that LAWA's E-Verify mandate imposes sufficient implementation costs on all affected Arizona companies for a membership

organization such as the Chamber to have standing without needing to identify a specific member.

Far from expressly preempting LAWA's licensing sanction, IRCA expressly saves state and local authority over sanctions imposed through licensing and similar laws (Section II). The disconnect that Plaintiffs allege between LAWA's licensing sanction and IRCA's savings clause cannot bridge the presumption against preemption (Section II.B) for issues, such as this, that states lawfully occupied before IRCA (Section II.D). Moreover, because IRCA's anti-discrimination provisions prohibit only intentional discrimination and LAWA operates based on illegal immigration status (not on nationality or lawful immigration status), Arizona has not violated either IRCA or the Equal Protection Clause (Section II.C).

Nor do IRCA's balancing of federal interests or a need for nationwide uniformity impliedly preempt state licensing sanctions (Section III). Because employers can comply with both IRCA and LAWA, Plaintiffs necessarily proceed under this Court's preemption jurisprudence that applies to state or local actions that frustrate or prevent federal objectives, which should require field preemption before a federal interest can trump an otherwise valid exercise of state or local authority. Any lesser standard will find federal preemption in spheres where Congress did not intend it.

Finally, IRCA does not impliedly preempt the LAWA E-Verify mandate because the voluntary federal E-Verify program nowhere evidences any congressional intent to mandate that E-Verify remain voluntary outside the federal system (Section

IV). The federal program's voluntary elements simply do not speak to preempting the states.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE THE LICENSING SANCTION AND DISCRIMINATION

Article III limits federal courts to "cases" and "controversies," U.S. CONST. art. III, §2, which must be actual or imminent. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Constitutional standing presents a tripartite test: cognizable injury to the plaintiffs, caused by the defendants, and redressable by a court. *Defenders of Wildlife,* 504 U.S. at 561-62. Because it goes to the Article III "power of the court to entertain the suit," standing "is the threshold question in every federal case." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). Moreover, plaintiffs bear the burden of establishing their standing, and federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). Membership associations have standing on the merits to litigate their members' injuries if an identified member (or an entire industry) has standing, the interest protected is germane to the membership organization, and nothing requires the member's participation as a party. *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977); *Summers v. Earth Island Institute,* 129 S.Ct. 1142, 1150-52 (2009).

To challenge both LAWA's licensing sanction and its E-Verify mandate, Plaintiffs must establish standing separately against each: "standing is not dispensed in gross." *Lewis v. Casey,* 518 U.S. 343,

358 n.6 (1996). Finally, although they do not brief standing, the parties cannot confer jurisdiction by consent or waiver. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982). Under the standing doctrine, the Chamber apparently has standing to challenge the E-Verify mandate, but no Plaintiff has standing to challenge LAWA's licensing sanction or any purported discrimination.

In order to bring this facial, pre-enforcement challenge to LAWA's licensing sanction, an employer (*i.e.,* one of the Chamber's members) must have a "credible threat" of facing an enforcement action. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). Moreover, to obtain relief on the merits – as distinct from merely surviving a motion to dismiss – a membership organization must identify at least one actual member with an actual, imminent injury. *Summers,* 129 S.Ct. at 1150.[2] As to the Plaintiffs that represent potential employees injured by LAWA, there are two types of potential injuries: (1) work-authorized aliens or citizens whom the immigration system will incorrectly identify as non-work-authorized, and (2) anyone – particularly those who seem "foreign" – who might not receive an offer of employment from over-cautious employers. The first group is small, and its injury is either too

[2] A plaintiff can assert the rights of absent third parties only if the plaintiff has standing in its own right, the plaintiff and the absent third parties have a "close" relationship, and a sufficient "hindrance" keeps the third parties from protecting their own interests. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio,* 499 U.S. 400, 411 (1991)).

speculative or too ephemeral to sustain this litigation. The second group represents the people that §1324b protects from discrimination.

With respect to work-authorized aliens or citizens that inaccurate data someday will deny employment, the injury is too speculative. Moreover, even if Plaintiffs had identified the necessary member with this injury, *Summers,* 129 S.Ct. at 1150, knowledge of the error in the federal databases would suffice to avoid any real LAWA-induced injury. That person could simply work with the federal government to correct the error at its source.

With respect to such alleged discrimination, it remains entirely speculative whether any particular work-authorized alien or citizen will suffer discrimination because a prospective employer considers them too foreign-seeming to risk making an offer of employment. *Babbitt,* 442 U.S. at 298 (standing requires "credible threat"). Moreover, the Chamber lacks associational standing to challenge discrimination *by its own members. Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976) (no standing for "self-inflicted" injuries). If such discrimination occurs, the member – not Arizona – causes it.

Of course, if LAWA *compelled* the Chamber's member companies to discriminate on the basis of national origin, the Chamber would have associational standing to challenge LAWA as discriminatory. *Truax v. Raich,* 239 U.S. 33, 36-38 (1915) ("If [employment] could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of

the laws would be a barren form of words");[3] *Lutheran Church-Missouri Synod v. FCC,* 141 F.3d 344, 350 (D.C. Cir. 1998) ("[w]hen the law makes a litigant an involuntary participant in a discriminatory scheme, the litigant may attack that scheme by raising a third party's constitutional rights"). But LAWA does not *compel* employers to discriminate. LAWA merely requires employees to confirm an employee's authorization to work.

Alleged discrimination aside, the E-Verify mandate nonetheless imposes training and implementation costs on the Chamber's Arizona member companies. Although "a corporation … has no racial identity and cannot be the direct target of the petitioners' alleged discrimination" that corporation nonetheless can have "standing to assert its own rights," and "[f]oremost among them is [the] right to be free of arbitrary or irrational [government] actions." *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977). The Chamber could have associational standing to challenge government action that imposes unnecessary costs on its members. Moreover, because the E-Verify mandate imposes costs on *all* regulated entities, the Chamber need not identify a particular member. *Summers,* 129 S.Ct. at 1150. It appears, therefore, that the Chamber could have standing to challenge LAWA's E-Verify mandate. If

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[3] One of this Court's earliest indirect-injury cases, *Truax,* involved an Austrian national's standing to challenge an Arizona law under which his employer would dismiss him solely to meet the Arizona law's quota on the percentage of aliens in the *employer's* workforce. *Id.*

so, this Court would review the issue without any heightened scrutiny that otherwise might attach to the discrimination issues that Plaintiffs and their *amici* raise.

II. FEDERAL LAW DOES NOT EXPRESSLY PREEMPT THE LICENSING SANCTION

Because LAWA's licensing sanction is not discriminatory and is consistent with both this Court's pre-IRCA decisions and IRCA's savings clause for "licensing and similar laws," Plaintiffs could not succeed in this facial challenge, even without the presumption against preemption. But this Court cannot presume that Congress would restrict existing state and local authority in areas – such as employment and business licensing – without making that intent plain. For all these reasons, IRCA does not expressly preempt LAWA.

A. Plaintiffs' Facial Challenge Does Not Meet the *Salerno* Test

The panel held – and Plaintiffs do not dispute – that Plaintiffs bring a facial challenge to LAWA. Under *U.S. v. Salerno,* 481 U.S. 739, 745 (1987), a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." Moreover, "[t]he fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.; Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n.5 (1982). Although *Salerno* requires facial challenges to meet a high burden of proof, Plaintiffs do not even acknowledge the issue.

As this Court recently emphasized, facial invalidation is counter to the judicial preference not to "nullify more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood,* 546 U.S. 320, 329 (2006). Facial challenges also interfere with the norm of statutory construction that enables avoidance of constitutional questions based on how narrowly a law is applied. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973); *cf. New York v. Ferber,* 458 U.S. 747, 767 (1982). Because LAWA is within Arizona's police power and non-discriminatory, plaintiffs cannot satisfy the *Salerno* standard here.

B. The Presumption against Preemption Applies to LAWA

Courts apply a presumption against preemption for fields traditionally occupied by state and local government. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). When this "presumption against preemption" applies, courts will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Id.* (emphasis added). Even if a court finds that Congress expressly preempted *some* state action, the presumption against preemption applies to determining the *scope* of that preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good,* 129 S.Ct. 538, 540 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)).

Courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [them] to assume that

Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine,* 129 S. Ct. 1187, 1195 n.3 (2009) (internal quotations omitted). For that reason, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* If states occupied the field historically, the presumption plainly applies.

Here, state and local government traditionally have occupied the field of business licensing and similar laws, this Court unanimously affirmed that exercise of the police power in *DeCanas* (notwithstanding the nexus with immigration law), and Congress expressly saved that exercise of the police power in IRCA. Given the savings clause for "licensing and similar laws," Congress did not expressly intend to preempt *any* such laws. But – even if Congress had some unexplained intent – the scope of the non-preempted "licensing and similar laws" bears a broad meaning because Congress expansively saved not only licensing laws but also all *similar* laws. Under the circumstances, Plaintiffs cannot cite "clear and manifest" congressional intent to displace states' historic police power over business licensing and employment.

C. LAWA Does Not Discriminate

Echoed by their *amici,* Plaintiffs argue that LAWA is discriminatory and, as such, conflicts with IRCA. *See* Pet. Br. at 60-62 (conflict preemption for LAWA's licensing sanction), 66 & n.27 (conflict preemption for LAWA's E-Verify mandate). Because IRCA's anti-discrimination provisions continue to apply, alongside LAWA, there is absolutely no conflict between LAWA and federal law. *Amicus* Eagle Forum ELDF respectfully submits that Plaintiffs and their *amici* misstate the

discrimination issue in this litigation. The question is not whether IRCA's anti-discrimination provisions impliedly preempt Arizona law, but whether the Fourteenth Amendment's Equal Protection Clause expressly preempts Arizona law. Arizona has not intentionally discriminated on the basis of national origin (or any other protected classification), so it has not discriminated against anyone.

Congress included the anti-discrimination provisions in IRCA because "Congress feared that employers, seeking to avert any possibility of sanctions being imposed on them, would simply refuse to hire 'foreign looking' or 'foreign sounding' persons." Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 9274, 9275 (Mar. 23, 1987) (*citing* H.R. REP. NO. 99-1000, 99th Cong., 2d Sess. 87 (1986), H.R. REP. NO. 99-682, 99th Cong., 2d Sess., pt. 1, at 68 (1986)). As the United States explains, these anti-discrimination provisions "ensure that employers do not engage in racial, ethnic, or other invidious discrimination against legal immigrants and other minorities." U.S. Br. at 2. Arizona lacks the authority to shield Arizona employers from §1324b, and (in any event) Arizona has not taken any steps to *require* Arizona employers to discriminate on the basis of national origin or any other protected classifications.

Indeed, §1324b does not even apply to Arizona acting as an independent sovereign under its police power to regulate employment in Arizona. But even if it did apply, §1324b is no broader than the intentional-discrimination standards of the Equal Protection Clause. Citing only provisions of Title VII of the Civil Rights Act of 1964 and two cases decided under Title VII, Plaintiffs' *amici* argue that "[t]he

federal prohibition on race- or national origin-based discrimination extends beyond practices that are motivated by animus against members of racial minorities or particular nationalities to reach practices that have a disparate impact on such individuals." Asian Am. Justice Ctr. *et al.* Br., at 11. However true that may be of Title VII, it is not true here:

> [IRCA] does not contain an analogue to paragraph (2) of section 703(a) of title VII, which has generally been the foundation of the prohibition against certain forms of unintentional discrimination merely on the basis of their disparate impact.

52 Fed. Reg. at 9275 (proposed rule). Instead, "the statute prohibits intentional discrimination rather than neutral conduct with an unintended disparate impact." Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 37,402, 37,403 (Oct. 6, 1987) (final rule); 28 C.F.R. §44.200(a) (limiting IRCA liability to those who "knowingly and *intentionally* discriminate or … engage in a pattern or practice of knowing and *intentional* discrimination") (emphasis added); *Rivera v. NIBCO, Inc.,* 364 F.3d 1057, 1073-74 (9th Cir. 2004) ("plaintiff [required to] prove that the employer had a discriminatory intent"). Whether it applies or not, §1324b prohibits only intentional discrimination.[4]

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[4] IRCA supplements Title VII by including a claim for discrimination on the basis of citizenship (which Title VII does not address), as distinct from discrimination on the basis of national origin (which Title VII does address). *Anderson v. Conboy,* 156 F.3d 167, 180 (2d Cir. 1998) ("citizenship

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The Fourteenth Amendment – not IRCA – prohibits Arizona's discriminating on the basis of race or national origin. This familiar standard applies to action taken "at least in part *because of,* not merely *in spite of,* its adverse effects" on a protected class. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979) (emphasis added); *Plyler v. Doe,* 457 U.S. 202, 223 (1982) ("[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy'"). Targeted against those popularly known as "illegal aliens," LAWA "discriminates" based on illegality, not on race or national origin.

Echoed by their *amici,* Plaintiffs cite recent non-record evidence that "foreign-born, work-authorized individuals were 20 times more likely to receive an erroneous tentative nonconfirmation than U.S.-born individuals." Pet. Br. at 49 n.27; Business Organizations Br. at 25. Assuming *arguendo* that these data are accurate, they also are irrelevant. In *Feeney,* the passed-over female civil servant alleged that Massachusetts' veteran-preference law for civil-service promotions and hiring constituted gender discrimination. Although women then represented less than two percent of veterans, *Feeney,* 442 U.S. at

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discrimination is not covered by Title VII"). Of course, someone alleging discrimination on the basis of national origin can bring a Title VII claim. *Id.; U.S. v. Todd Corp.,* 900 F.2d 164, 168 (9th Cir. 1990). Indeed, cognizant of the partial overlap, Congress drafted IRCA to exempt national-origin discrimination covered by Title VII. 8 U.S.C. §1324b(a)(2)(B).

270 n.21, Massachusetts did not discriminate *because of gender* when it acted because of another, permissible criterion (veteran status). *Id.* at 272. With women then constituting two percent of all veterans, men were *fifty times* more likely (50:1) to benefit from the state law challenged in *Feeney*. Under the circumstances, Plaintiffs' much lower alleged 20:1 disparity is a constitutional irrelevance. Like Massachusetts, Arizona acted *because of* permissible criteria, which is not discrimination.

Where, as here, a state or local law does not "discriminate[] against aliens *lawfully admitted* to this country," it is constitutional. *DeCanas,* 424 U.S. at 358 n.6 (emphasis added); *INS v. Nat'l Ctr. for Immigrants' Rights,* Inc., 502 U.S. 183, 196 n.11 (1991). Consistent with *DeCanas, Feeney,* and *Plyler,* LAWA readily meets constitutional scrutiny under the Equal Protection Clause. Neither the Constitution nor any federal statute prohibits "discrimination" against illegality.

D. IRCA Does Not Facially Preempt the Licensing Sanction

Where illegal immigration intersects with local employment and business licensing, the states have had (and continue to have) a role in enforcing both state and federal law. The seminal precedent is this Court's unanimous *DeCanas* decision, which upheld a state law penalizing the employment of illegal aliens. Our system of dual sovereignties provides ample room for federal, state, and local government to address the various impacts of illegal aliens. Indeed, *DeCanas* upheld the state law because "it focuses directly upon these *essentially local problems* and is tailored to combat effectively the perceived evils." *DeCanas,* 424 U.S. at 357

(emphasis added). Nothing in IRCA or any other law in any way limits that authority or suggests that illegal entry and residency are to be protected, respected, or tolerated.

1. The Licensing Sanction Falls within Arizona's Police Power

Prior to IRCA's enactment, Arizona "possess[ed] broad authority under [its] police powers to regulate the employment relationship to protect workers within [Arizona]." *DeCanas,* 424 U.S. at 356. Similarly, prior to IRCA, federal law did not limit that "broad authority."

> [Courts] will not presume that Congress, in enacting [federal immigration law], intended to oust state authority to regulate the employment relationship … in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was the clear and manifest purpose of Congress would justify that conclusion.

DeCanas, 424 U.S. at 357 (interior quotations and citations omitted). Far from finding congressional intent to preempt state regulation of alien employment practices, *DeCanas* "rejected the pre-emption claim … because Congress *intended* that the States be allowed, to the extent consistent with federal law, [to] regulate the employment of illegal aliens." *Toll v. Moreno,* 458 U.S. 1, 13 n.18 (1982) (citing *DeCanas,* 424 U.S. at 361) (interior quotations omitted, emphasis and second alteration in original). Thus, prior to IRCA's enactment, it is indisputable that Arizona's police power included the authority to

adopt LAWA and to regulate the business licenses of entities within Arizona.

Moreover, "broad authority" to combat illegality is central to the "police power." *Jacobson v. Massachusetts,* 197 U.S. 11, 27 (1905) (under "principle of self-defense, … a community has the right to protect itself"). Indeed, suppressing crime "has always been the prime object of the States' police power." *U.S. v. Morrison,* 529 U.S. 598, 615 (2000); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873) (police power extends "to the protection of the lives, limbs, health, comfort, and quiet of all persons") (interior quotations omitted). Plaintiffs' view would deny Arizona the "right to protect itself" from unlawful employment and its accompanying effects. The lawlessness that follows is predictable and, if Arizona has the "right to protect itself," entirely preventable.

For purposes of express preemption, Plaintiffs must concede that IRCA saves state and local authority to sanction the employment of illegal aliens through "licensing and similar laws." *See* 8 U.S.C. §1324a(h)(2). While Plaintiffs do not dispute that IRCA retained that state and local authority, they do dispute whether LAWA's licensing sanction qualifies as a "licensing or similar law" and, even if so, whether LAWA goes too far by suspending articles of incorporation. Pet. Br. at 34-36. The first argument is addressed in Section II.D.2, *infra,* and the second in Section II.D.3, *infra.* Both arguments lack merit.

2. IRCA Does Not Displace the States' Police Power

The prior sections establish that Arizona had police-power authority to regulate employment of illegal aliens prior to IRCA's enactment in 1986, and that LAWA falls squarely within that police power. To complete the analysis, IRCA emphatically *did not* displace that police power.

At the outset, §1324a(h)(2)'s plain language saves state and local authority for licensing and similar laws, an area that state and local government historically has occupied. Thus, while §1324a(h)(2) plainly establishes express preemption, it equally plainly saves the state and local authority recognized in *DeCanas*. Given the express statutory language and the presumption against preemption even when interpreting express preemption, §1324a(h)(2) clearly does not preempt LAWA. *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 568 (2005) ("the authoritative statement is the statutory text, not the legislative history"); *Medtronic,* 518 U.S. at 485 (presumption against preemption applies to determining statute's preemptive scope). This Court can begin and end its inquiry with §1324a(h)(2)'s plain language.

Should the Court analyze the legislative history, however, the available history does not alter the outcome. The House report expressly enumerates certain preempted actions (namely, civil and criminal sanctions for employment and recruitment) while also enumerating non-preempted actions (namely, denying licenses to those found to have violated immigration laws and "fitness to do business laws"). H.R. REP. NO. 99-682(I), at 58, *reprinted in* 1986 U.S.C.C.A.N. at 5662. Although the House

report does not expressly authorize enforcement of a state or local ordinance prior to federal enforcement of immigration laws, the House report does not expressly preempt that either. *Id.* Given the presumption against preemption, even in interpreting expressly preemptive statutes, *Medtronic, supra,* the House report does not provide a "clear and manifest" congressional intent to preempt that which *DeCanas* allowed. *Chem. Mfrs. Ass'n v. NRDC,* 470 U.S. 116, 128 (1985) (Congress would not "ignore the thrust of an important decision" *sub silentio*). In short, nothing suggests that Congress ever intended to preempt state and local actions like LAWA.

Assuming *arguendo* that IRCA saved only "licensing laws" and not "similar laws," Plaintiffs would have a weak but at least colorable argument. In essence, Plaintiffs make the somewhat-technical point that Arizona does not issue licenses under LAWA, so LAWA is not a "licensing law." Pet. Br. at 34-35. But LAWA plainly supplements all Arizona licensing laws with a uniform rule that applies equally to all such laws. Numerous federal statutes provide such uniform rules of practice, without delving into substantive issues of any particular sphere. For example, without issuing any particular license, the Administrative Procedure Act provides the rules of practice for federal licenses. 5 U.S.C. §§554-558. Similarly, without dispensing any federal funds, Title VI of the Civil Rights Act of 1964 is "Spending Clause legislation," *Guardians Ass'n v. Civil Service Comm'n of City of New York,* 463 U.S. 582, 599 (1983), because it sets the rules of practice with respect to racial discrimination by recipients of federal funds.

The alternative – namely, for Arizona to have scattered identical mini-LAWAs throughout the Arizona Code – would not have been very sensible. Instead, Arizona sensibly consolidated the uniform rules of practice in a single chapter that applies across the board, notwithstanding the general provisions of any particular licensing law. Again assuming *arguendo* that IRCA saved only "licensing laws" and not "similar laws," a plaintiff could argue unsuccessfully but at least colorably that such a licensing meta-law does not qualify as a "licensing law." Given that IRCA saves not only "licensing laws" but also "similar laws," 8 U.S.C. §1324a(h)(2), Plaintiffs' argument is specious. Even if not itself a "licensing law," LAWA is "similar" enough, even without the presumption against preemption.

3. IRCA Saves Authority beyond Qualification-Based Licenses

At least for the Chamber members organized as corporations under Arizona law, the biggest complaint against the licensing sanction is that it extends beyond qualification-based licenses and licenses to conduct business to include articles of incorporation. Pet. Br. at 35 (describing this as the "business death penalty"). Insofar as "[c]orporations are creatures of state law," *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 479 (1977), the question for this Court is not whether this so-called "business death penalty" is unwise or whether the LAWA procedures for applying the business death penalty are unfair. The only question is whether, given the presumption against preemption (Section II.B, *supra*) and the availability of this type of state action before IRCA (Section II.D.1, *supra*), the licensing sanction's extending to articles of incorporation falls

within IRCA's allowance for state sanctions under "licensing and *similar* laws."

Plaintiffs cite Arizona Legislative Bill Drafting Manual, §4.21 (2009) for the proposition that "'licensing' … mean[s] fitness to do business." Pet. Br. at 28. By its terms, the cited authority defines "the three separate categories of authorization that distinguish the regulation of occupations," which are licensing, certification, and registration. *See* Michael E. Braun, Director & J. Cavenee Smith, Council Attorney, Arizona Legislative Council, Arizona Legislative Bill Drafting Manual, at 50-51 §4.21 (2009).[5] Assuming *arguendo* that this manual could bind Arizona, without bicameralism and presentment, initiative, or referendum, ARIZ. CONST. art. IV, Pt. 1 §1, Pt. 2 §12, two issues bear emphasis. First, by its terms, the section addresses only "the regulation of occupations," *id.,* so it is not surprising that the licensing definition relates only to occupational licensing. Second, the inclusion of the two additional terms – namely, certification[6] and registration[7] – are very similar, in the occupational-licensing context, to articles of incorporation filed

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[5] Available at http://www.azleg.gov/alisPDFs/council/2010-%20Bill%20Drafting%20Manual.pdf (last visited Oct. 28, 2010).

[6] "Certification is a form of regulation that grants recognition to persons who have met predetermined qualifications. Only those who meet the qualifications may legally use the designated title." *Id.* (emphasis in original).

[7] "Registration is the least restrictive alternative form of regulation. Registration requires that a person file that person's name and address with a designated agency." *Id.* (emphasis in original).

with the Arizona Corporation Commission. As such, Plaintiffs' evidence makes Arizona's point: all of LAWA's cited forms of licenses qualify as licenses *or similar* items.

Plaintiffs also invent conflict between IRCA's history and amendments with respect to farm labor contract laws and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"). Pet. Br. at 26, 32-34. With respect to the former, the legislative history plainly uses them as a mere example: "licensing or 'fitness to do business laws,' *such as* state farm labor contractor laws or forestry laws". H.R. REP. NO. 99-682(I), at 58, *reprinted in* 1986 U.S.C.C.A.N. at 5662 (emphasis added). Similarly, IRCA's conforming amendments to AWPA are equally consistent with Arizona's or Plaintiffs' views, depending on the breadth (Arizona) or narrowness (Plaintiffs) attributed to the statutory phrase "licensing and similar laws." Plaintiffs tautologically first imagine conflict, then use that imagined conflict as evidence of actual conflict.

Several legal authorities suggest that state corporation commissions "license" corporations upon their filing articles of incorporation. *See, e.g., Goodman v. Darden, Doman & Stafford Associates,* 100 Wash.2d 476, 477-78, 670 P.2d 648, 650 (Wash. 1983) (state issues "corporate license" upon filing of articles of incorporation); *DuVall v. Moore,* 276 F.Supp. 674, 677 (D. Iowa 1967) (same); *Northwestern Nat. Ins. Co. v. Freedy,* 227 N.W. 952, 953-54 (Wis. 1929) (domestic corporation does not require a further license to conduct business within its charter). Certainly, whatever the name that applies, the Arizona Corporation Commission's

approval enables and permits the entity in question to transact business under the corporate form:

> The corporation commission shall have the sole power to issue *certificates of incorporation* to companies organizing under the laws of this state, and to issue *licenses* to foreign corporations to do business in this state.

ARIZ. CONST. art. XV, §5 (emphasis added); *see also* ARIZ. CONST. art. XIV, §17 (providing for payment of a tax "by every domestic corporation, upon the grant, amendment, or extension of its charter, and by every foreign corporation upon its obtaining a license to do business in this state"). Approving a domestic corporation's charter is simply the in-state equivalent of licensing a foreign corporation. Even if that is not a license *per se,* it nonetheless falls within IRCA's broad allowance for state sanctions under "licensing *and similar laws*." 8 U.S.C. §1324a(h)(2) (emphasis added). This is particularly true given the presumption against preemption. Of course, if it wants to tighten IRCA's language and to clarify its preemptive intent, Congress remains free to do so.

III. FEDERAL LAW DOES NOT IMPLIEDLY PREEMPT THE LICENSING SANCTION

Plaintiffs argue that IRCA impliedly preempts LAWA by undermining both national uniformity and the "careful balance" that IRCA strikes between discouraging illegal immigration, preventing discrimination, and minimizing the burden on

employers. Pet. Br. at 37-46.[8] Conflict preemption includes both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that *prevent or frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). Because nothing prevents compliance with both federal law and LAWA, Plaintiffs necessarily invoke the second prong of conflict preemption.[9]

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[8] Plaintiffs also argue that – unlike express preemption – conflict preemption has no presumption against preemption. *Id.* at 37 (*citing Wyeth v. Levine,* 129 S. Ct. 1187, 1220 (2009) (Alito, J., dissenting)). However true that may be in general, it is irrelevant here because numerous alternate rules of construction lead to the same conclusion. *U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (state law remains applicable where "Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it"); *Chem. Mfrs. Ass'n,* 470 U.S. at 128 ("absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision"); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 646 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (interior quotations omitted, alteration in original).

[9] Eagle Forum ELDF interprets the question presented as whether IRCA impliedly preempts LAWA's licensing sanction. Read literally, the question ties the "comprehensive scheme" found in *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147 (2002), to implied preemption. The question whether federal law is sufficiently comprehensive to remove the National Labor Relations Board ("NLRB") from a sphere, as a

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Eagle Forum ELDF respectfully submits that this prevent-or-frustrate preemption "wander[s] far from the statutory text" and improperly "invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth,* 129 S.Ct. at 1205 (characterizing this prong as "'purposes and objectives' pre-emption") (Breyer, J., concurring); *cf. Crosby v. National Foreign Trade Council,* 530 U.S. 363, 373 (2000) ("the categories of preemption are not 'rigidly distinct,' [and] 'field pre-emption may be understood as a species of conflict pre-emption'") (*quoting English v. General Elec. Co.,* 496 U.S. 72, 79, n.5 (1990)). Because not every difference qualifies as sufficient conflict or frustration to preempt state law, Plaintiffs cannot prevail on this theory unless the federal presence qualifies as field preemption.

Contrary to Plaintiffs' procrustean approach, federalism permits and encourages state and local government to experiment with measures that enhance the general welfare and public safety. This federalism is central to our system of government:

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matter of statutory interpretation, is an inherently different question from whether Congress intended to remove state sovereigns from that sphere. *See id.* ("where [NLRB's] chosen remedy trenches upon a federal statute or policy outside [NLRB's] competence to administer, [NLRB's] remedy may be required to yield"). It is consistent for IRCA comprehensively to remove NLRB without comprehensively removing the states.

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring); "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth,* 129 S.Ct. at 1205 (interior quotations and citations omitted) (Breyer, J., concurring). Thus, absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role.

Perhaps because they elected to bring a pre-enforcement facial challenge, Plaintiffs misperceive how LAWA operates. Whereas Plaintiffs fear state adjudication of employees' federal immigration status, LAWA requires the state to utilize not only federal standards, but also federal proof. *See* Arizona Br. at 48-53. As Arizona explains, the prosecution must obtain information on immigration status from the federal government pursuant to 8 U.S.C. §1373(c), but for purposes of LAWA the defense can rebut this federal information to show that the employer acted lawfully. By contrast, the prosecution's case can succeed only if supported by the federal information. Arizona Br. at 49. Nothing

in LAWA conflicts with federal primacy in determining an employee's immigration status.[10]

In any event, Plaintiffs' "careful balance" argument is too insufficient a federal interest to displace Arizona's police power over an issue of dual federal-state concern. Specifically, the balance argument posits that IRCA carefully balanced employing illegal aliens, discrimination, and burdens on employers. The first of these interests is an issue of dual federal-state concern. *DeCanas,* 424 U.S. at 357. Congress addressed the second issue by enacting 8 U.S.C. §1324b, which "ensure[s] that employers do not engage in racial, ethnic, or other invidious discrimination against legal immigrants and other minorities." U.S. Br. at 2. Because Congress has armed the potential victims of discrimination with a means to redress any discrimination that occurs, Congress has balanced the discrimination issue. If Arizona's actions indeed expand the number of instances of that discrimination, the two sides (employers and potential work-authorized employees) nonetheless remain balanced by §1324b. Finally, while federal reticence for burdens imposed on employers is admirable, federal floors do not automatically constitute ceilings in every case. Nothing in IRCA suggests that Congress intended to displace state or

[10] Plaintiffs lack standing to challenge the ability of Arizona employers who are guilty under federal standards to escape state-law liability based on state evidentiary standards that allow the defense (but not the prosecution) to rebut a federal determination that the employer employed an illegal alien.

local police power to regulate employers to address local issues and concerns.

In their "careful balance" arguments, Plaintiffs also cite decisions from litigation under inapposite statutory contexts to raise the specter of a "patchwork of … [different] laws, rules, and regulations." Pet. Br. at 15 (*quoting Rowe v. N.H. Motor Trans. Ass'n,* 552 U.S. 364, 373 (2008), alterations by Plaintiffs). *Rowe* concerned the Airline Deregulation Act, where Congress intended "maximum reliance on competitive market forces" (*id.* at 993) and "to leave such decisions, where federally unregulated, to the competitive marketplace" (*id.* at 996). Here, by contrast, §1324a(h)(2) *expressly saves* state and local authority in a field within the historic state and local police power. Similarly, Plaintiffs ground their claim that the Act's licensing sanction conflicts with federal law by citing cases where state or local sanctions conflicted with U.S. foreign policy. Pet. Br. at 40-41, 45 (*citing American Ins. Ass'n v. Garamendi,* 539 U.S. 396, 427 (2003) *and Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 380 (2000)). Foreign policy represents an area where the federal power is at its zenith, *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 449 (1979), but this case raises no such concerns. As such, *Garamendi* and *Crosby* are inapposite.

Neither Plaintiffs' patchwork argument nor its federal-balance argument make it *impossible* to comply with both LAWA and federal law. And the differences between LAWA and federal law are insufficient conflict to displace Arizona's valid exercise of its policy power. As such, Plaintiffs'

conflict-preemption challenge to Arizona's licensing sanction must fail.

IV. THE VOLUNTARY FEDERAL E-VERIFY PROGRAM DOES NOT PREEMPT ARIZONA'S E-VERIFY MANDATE

Plaintiffs put forward two basic arguments against Arizona's E-Verify mandate. First, Plaintiffs argue that the heading to the statutory section that authorizes E-Verify includes the word "voluntary" and that federal law prohibits the Department of Homeland Security from mandating E-Verify outside of certain federal agencies, contractors, and IRCA violators. Pet. Br. at 47-50. Second, relying primarily on *Geier v. Am. Honda Motor Co.,* 529 U.S. 861 (2000), Plaintiffs argue that Arizona cannot mandate E-Verify because Congress adopted it as a voluntary program for federal purposes. Pet. Br. at 50.[11] Plaintiffs' first argument is makeweight, and its second does not fare much better.

The use of the word "voluntary" to describe E-Verify in a statutory heading does not carry much, if any weight. *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.,* 128 S.Ct. 2326, 2336 (2008) ("a subchapter heading cannot substitute for the operative text of the statute"); *Zimmerman v. Oregon Dep't of Justice,* 170 F.3d 1169, 1175 (9th Cir. 1999) (courts look to headings to resolve – not to create –

[11] Plaintiffs also raise a fear of the states' adopting "50 different [regulatory] regimes," *id.* at 51 (*quoting Bates,* 544 U.S. at 451-53, Plaintiffs' alteration), which is puzzling because Arizona merely mandated a federal program (*i.e.,* the state regime is not "different").

doubt); *Whitman v. American Trucking Associations,* 531 U.S. 457, 483 (2001) (headings can "only she[d] light on some ambiguous word or phrase in the statute itself") (internal quotations omitted, alteration in original). Plaintiffs also cite IIRIRA §402(a), 110 Stat. at 3009-546, for the proposition that the "Secretary of Homeland Security may not require any person or other entity to participate in [E-Verify]." Pet. Br. at 10. But nothing in that directive – limited to a single federal officer – prohibits all "government" from requiring participation in E-Verify. Moreover, the various steps at which Congress declined to make E-Verify mandatory cannot modify the original non-preemptive intent. *Fourco Glass Co. v. Transmirra,* 353 U.S. 222, 227 (1957) (revised or consolidated laws not "intended to change their effect unless such intention is clearly expressed").

Plaintiffs are not merely wrong but "*quite wrong* to view [the] decision [not to regulate] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 65 (2002) (emphasis added). While "an authoritative federal determination that the area is best left *un*regulated … would have as much pre-emptive force as a decision *to* regulate," *id.* at 66 (emphasis in original), *Geier,* 529 U.S. at 881, Congress has not done so merely by declining to require E-Verify as a matter of federal law.[12]

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[12] Arizona's E-Verify mandate does not discriminate in violation of either IRCA or the Equal Protection Clause. *See*

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To foreclose state and local regulation, courts require that Congress make an affirmative statement against regulation, not that Congress merely refrain from regulating. *See, e.g., Sprietsma,* 537 U.S. at 67 (*Geier* involved "an affirmative policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car") (interior quotations omitted, emphasis in original); *Rowe v. N.H. Motor Trans. Ass'n,* 128 S.Ct. 989, 993, 996 (2008) (Airline Deregulation Act intended "to leave such decisions, where federally unregulated, to the competitive marketplace" to enable "maximum reliance on competitive market forces"). The merely voluntary nature of E-Verify as a matter of federal law does not come even close to displacing state authority to mandate its use.

CONCLUSION

For the foregoing reasons and those argued by Arizona, this Court should affirm the Ninth Circuit.

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Section II.C, *supra.* Indeed, if using E-Verify were discriminatory, it would be unlawful merely to *allow* its use. *City of Los Angeles v. Lyons,* 461 U.S. 95, 105-06 (1983); *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 45 n.25 (1976). Thus, assuming *arguendo* that E-Verify itself was discriminatory, the voluntary federal E-Verify regime would be every bit as unconstitutional as Plaintiffs allege that Arizona's E-Verify mandate is unconstitutional. As explained, however, whether mandatory or voluntary, E-Verify is not itself discriminatory.

October 28, 2010

Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave,
NW, Suite 200
Washington, DC 20036
Tel (202) 669-5135
Fax (202) 318-2254
Email lj@larryjoseph.com