No. 09-115

In The
Supreme Court of the United States

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, *et al.*,

Petitioners,

vs.

CRISS CANDELARIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TERRY GODDARD
Attorney General of Arizona
MARY R. O'GRADY*
Solicitor General
CHRISTOPHER A. MUNNS
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-8305

**Counsel of Record*

Counsel for Respondents Arizona Governor Janice K. Brewer, Department of Revenue Director Gale Garriott, and William Mundell, Registrar of Contractors

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

ROGER W. HALL
BUCKLEY KING
2020 North Central Avenue
Suite 1120
Phoenix, Arizona 85004
(602) 325-1962
Counsel for Respondents County Attorneys of Apache, Cochise, Gila, Graham, Greenlee, La Paz, Mohave, Navajo, Santa Cruz, and Yavapai Counties

GEORGIA A. STATON
EILEEN D. GILBRIDE
JONES SKELTON & HOCHULI PLC
2901 North Central Avenue
Suite 800
Phoenix, Arizona 85012
(602) 263-1752
Counsel for Respondent Andrew P. Thomas, Maricopa County Attorney

CHRIS M. ROLL
PINAL COUNTY ATTORNEY'S OFFICE
P.O. Box 887
Florence, Arizona 85232
(520) 866-6935
Counsel for Respondent James P. Walsh, Pinal County Attorney

MICHAEL JAY LESSLER
COCONINO COUNTY ATTORNEY'S OFFICE
110 East Cherry Street
Flagstaff, Arizona 86001
(928) 779-6518
Counsel for Respondent David W. Rozema, Coconino County Attorney

DANIEL S. JURKOWITZ
PIMA COUNTY ATTORNEY'S OFFICE
32 North Stone Avenue
Suite 2100
Tucson, Arizona 85701
(520) 740-5750
Counsel for Respondent Barbara LaWall, Pima County Attorney

WILLIAM J. KEREKES
YUMA COUNTY ATTORNEY'S OFFICE
250 West 2nd Street
Suite G
Yuma, Arizona 85364
(928) 817-4300
Counsel for Respondent Jon Smith, Yuma County Attorney

QUESTIONS PRESENTED

1. Does federal law preempt Arizona's laws establishing the sanctions to be imposed against the licenses of employers that knowingly or intentionally hire unauthorized aliens, given that 8 U.S.C. § 1324a(h)(2) specifically permits state sanctions for such conduct "through licensing or similar laws"?

2. Does Arizona's statute requiring Arizona employers to use the federal E-Verify program to confirm that new employees are legally authorized to work in the United States conflict with federal law because Congress has not mandated the use of this federal program for employers nationally?

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INTRODUCTION

This case presents two narrow preemption questions that the lower courts correctly resolved by applying this Court's precedent and the relevant statutory language. This Court should deny the Petition for Certiorari in this case because there is no circuit split to resolve, the lower courts correctly resolved the issues that the case presents, and Petitioners' concerns about immigration policy are more appropriately directed to Congress than to this Court.

First, Petitioners challenge the validity of Arizona's law establishing sanctions against employers that knowingly or intentionally employ unauthorized aliens. Pet. at 20-25. Arizona's law provides for the suspension and revocation of state licenses of employers that engage in that unlawful conduct. As the Ninth Circuit correctly concluded, federal law does not preempt these state sanctions because in the Immigration Reform and Control Act of 1986 (IRCA) Congress expressly permitted states to impose sanctions through "licensing and similar laws," although it preempted other state civil and criminal sanctions. 8 U.S.C. § 1324a(h)(2).

Second, Petitioners challenge Arizona's requirement that employers within the State use the federal E-Verify program to confirm whether their new employees are authorized to work in this country. Pet. at 25-28. E-Verify is an internet-based verification system that the U.S. Citizenship and Immigration Service (USCIS) operates in partnership with the

Social Security Administration. Congress initially authorized it as a limited pilot program and then made it available nationally to improve the process for confirming that employees may lawfully work in this country. It provides an online link to federal databases that allows employers to confirm electronically that newly hired employees are eligible to work in this country. Although Congress prohibited the federal government from requiring employers throughout the country to use E-Verify, it did not prohibit state policymakers from requiring employers within their jurisdiction to use this federal program. The lower courts correctly concluded that federal law does not preempt Arizona's E-Verify requirement, noting that Arizona's requirement supports the federal government's objective of expanding E-Verify's use. Pet. App. at 21a.

Petitioners' concern about a "crazy-quilt of state and local immigration statutes" and the burdens that they impose on employers is unwarranted. Pet. at 4. Arizona's sanctions statute does not impose any new obligations on employers because IRCA's federal-law provisions already prohibit employers from knowingly employing unauthorized aliens. 8 U.S.C. § 1324a. Arizona's law merely establishes state sanctions for that illegal conduct, as Congress specifically permits states to do in 8 U.S.C. § 1324a(h)(2). In addition, Arizona's E-Verify provision simply requires Arizona employers to participate in a congressionally authorized federal program that is already available nationwide.

The interest of Petitioners and their amici in the issues presented in this case reflects immigration's importance as a public-policy issue in this country. Although no one disputes the general importance of immigration policy, that does not mean every dispute about a state or local measure regarding illegal immigrants merits this Court's review. The Ninth Circuit is the only federal court of appeals to have addressed the narrow preemption issues posed by this case, and similar issues are pending in other circuits. This Court's ordinary practice in such a situation is to wait and see whether a circuit conflict arises. Nothing the Solicitor General might say about this case can change that. The Petition should be denied.

STATEMENT OF THE CASE

This case involves a facial challenge to the Legal Arizona Workers Act (the "Act"), A.R.S. §§ 23-211 to 23-214 (Supp. 2007), enacted July 2, 2007. 2007 Ariz. Sess. Laws, ch. 279. Petitioners' lawsuit challenged two provisions in the Act: (1) A.R.S. § 23-212 ("the sanctions statute"), which establishes sanctions against Arizona employers who knowingly or intentionally employ unauthorized aliens and (2) A.R.S. § 23-214 ("the verification statute"), which requires Arizona employers to use the federal E-Verify

program to confirm that new employees are authorized to work in this country.[1]

A. Arizona's Statutes Providing for Sanctions Against Employers that Knowingly or Intentionally Employ Unauthorized Aliens.

Arizona's Legislature crafted its statute authorizing sanctions against employers that knowingly or intentionally employ unauthorized aliens to fall within IRCA's provision that preserves state authority to impose sanctions "through licensing and similar laws," 8 U.S.C. § 1324a(h)(2). As enacted in 2007, the sanctions statute established that employers "shall not intentionally employ an unauthorized alien or knowingly employ an unauthorized alien," and set forth various sanctions to be imposed against an employer's business license for violations of the statute. A.R.S. § 23-212(A) (as enacted in 2007 Ariz. Sess. Laws, ch. 279). The Act defines "license" to

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[1] The Arizona Legislature amended the Act in May 2008 while this case was pending in the Ninth Circuit. 2008 Ariz. Sess. Laws, ch. 152. The Arizona statutes included in Appendix F to the Petition reflect the law 2008 amendments. One of the 2008 amendments separated the sanctions statute, A.R.S. § 23-212, into two separate statutes. It limited A.R.S. § 23-212 to sanctions for knowingly employing unauthorized aliens, and it added A.R.S. § 23-212.01, which addresses sanctions for intentionally employing unauthorized aliens. This response will generally cite only to A.R.S. § 23-212 and will refer to that as the sanctions statute, but will include a specific citation to A.R.S. § 23-212.01 if necessary because of the context.

include "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," A.R.S. § 23-211(9)(a), and expressly includes articles of incorporation, certificates of partnership, and foreign corporation registrations in the definition, A.R.S. § 23-211(9)(b). It also incorporates the definitions of "knowingly employ" and "unauthorized alien" that IRCA sets forth at 8 U.S.C. § 1324a and § 1324a(h)(3), respectively. A.R.S. § 23-211(8) and (11).

The Arizona Attorney General and the county attorneys investigate complaints alleging that an employer has knowingly or intentionally employed an unauthorized alien, A.R.S. § 23-212(B), but only county attorneys may bring enforcement actions to impose sanctions against an employer, A.R.S. §§ 23-212(C)(3), 23-212(D). To investigate complaints, state officials request information from the federal government pursuant to 8 U.S.C. § 1373(c)[2] and the county attorneys must use the information that the federal government provides to establish work authorization

[2] Communication between federal immigration agencies and state and local governments are addressed in 8 U.S.C. § 1373. Subsection (c) requires the USCIS to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information."

status in any enforcement action that is filed under the sanctions statute. A.R.S. § 23-212(B), (H). A court may impose sanctions only after it has determined that the employer "intentionally" or "knowingly" employed an unauthorized alien. A.R.S. §§ 23-212(F), -212.01(F). The Act creates a rebuttable presumption in enforcement actions that employers that have used E-Verify have not violated the law. A.R.S. § 23-212(I). And, as is true in federal enforcement actions, employers have an affirmative defense if they have "complied in good faith" with the I-9 system for verifying that employees are authorized to work in this country. A.R.S. § 23-212(J); 8 U.S.C. § 1324a(b)(6).

Arizona's law creates a graduated penalty scheme. For a first adjudicated knowing violation during a three-year period, the court must order the employer to terminate the employment of all unauthorized aliens, to file quarterly reports of new hires for a three-year probation period, and to file an affidavit within three days that it has terminated all unauthorized aliens and that it will not intentionally or knowingly employ an unauthorized alien. A.R.S. § 23-212(F)(1)(a)-(c). If the employer fails to file the affidavit on time, its business licenses will be suspended until it does. A.R.S. § 23-212(F)(1)(c). The court also may suspend an employer's business licenses for up to ten days after considering various factors, such as the number of unauthorized aliens employed, prior misconduct, and the degree of harm resulting from the violation. A.R.S. § 23-212(F)(1)(d).

For a first adjudicated intentional violation during a five-year period, the sanctions are the same except that the probation and reporting period is five years and the suspension of business licenses for a minimum of ten days is mandatory. A.R.S. § 23-212.01(F)(1). For a second adjudicated knowing or intentional violation during the probation period, the Court must permanently revoke an employer's business license. A.R.S. §§ 23-212(F)(2), -212.01(F)(3). An employer found to have violated the sanctions statute may exercise the same appeal rights that exist for other litigants in civil actions.

B. Arizona's Requirement that Employers Use E-Verify.

The Act requires Arizona employers to use the federal government's E-Verify program (formerly known as the Basic Pilot program) to confirm that any newly hired employees are authorized to work in this country. A.R.S. § 23-214. It does not impose any penalty on employers that fail to use the program.[3]

Congress established the E-Verify program in 1996 pursuant to the Illegal Immigration Reform and

[3] The 2008 amendments to the Act, which were not at issue in this case, added subsections B and C to A.R.S. § 23-214. Subsection B addresses employers that receive an economic development incentive from state of local governments, and subsection C requires the Arizona Attorney General to post a list of Arizona employers participating in the E-Verify program on the Attorney General's website.

Immigrant Responsibility Act of 1996 (IIRIRA). Pub. L. No. 104-208, §§ 401 to 404, 110 Stat. 3009, 3009-655 to 3009-666. E-Verify is designed to provide employers with a more accurate and efficient way to verify their employees eligibility to work in this country while protecting employee rights. *See* Westat INS Basic Pilot Evaluation Summary Report (Jan. 2002), Dkt. 148, Ex. 10 at 5. Although initially available in only five of the seven States with the largest population of unauthorized aliens, E-Verify is now available in all fifty States, the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944, 1944. It provides an online link to federal databases that allows employers to verify the employment eligibility of newly hired employees. USCIS, *I Am an Employer . . . How Do I . . . Use E-Verify?* (Form M-655 8/08), available at http://www.uscis.gov/files/article/E4eng.pdf (last visited Sept. 16, 2009). Access to E-Verify is free. *Id.*

The system electronically compares information that the employee submits on the Employment Eligibility Verification Form I-9 with records of the SSA and the Department of Homeland Security (DHS). *See* USCIS, E-Verify User Manual (Form M-574 9/07), Dkt. 148, Ex. 8 at 1. If the information in the database confirms that the person is authorized to work in this country, the employer promptly receives a message to that effect. If the information does not confirm that the person is authorized to work in this

country, the program provides a "tentative non-confirmation" notice, and the employee must follow up with the appropriate federal agencies to resolve the problem. *See id.* at 9-25. According to the USCIS, "E-Verify is currently the best means available for employers to verify electronically the employment eligibility of their newly hired employees. E-Verify virtually eliminates Social Security mismatch letters, improves the accuracy of wage and tax reporting, protects jobs for authorized U.S. workers, and helps U.S. employers maintain a legal workforce." USCIS, *I Am an Employer . . . How Do I . . . Use E-Verify?* (Form M-655, 8/08), available at http://www.uscis.gov/files/article/E4eng.pdf (last visited Sept. 16, 2009).

C. Procedural Background

Petitioners separately filed lawsuits challenging the Act on July 13, 2007 (CV07-01335, Dkt. 1) and September 4, 2007 (CV07-01684, Dkt. 1), only a few weeks after former Arizona Governor Janet Napolitano signed the measure into law and well before the January 1, 2008, effective date of the E-Verify requirement and the sanctions statute. The defendants in these consolidated actions were Arizona's Governor, Attorney General, and the Director of the Arizona Department of Revenue. The district court consolidated these actions (CV07-01335, Dkt. 39) and subsequently dismissed them for lack of subject matter jurisdiction. Pet. App. at 126a. The court concluded that there was no justiciable controversy against the named defendants because none of them enforced the

Act. Pet. App. at 98a. In the first lawsuits, Petitioners failed to include the county attorneys as named defendants, and only county attorneys may bring enforcement actions under the sanctions statute. Pet. App. at 126a. Petitioners appealed the district court's decision to the Ninth Circuit and also promptly filed new lawsuits in district court naming Arizona's county attorneys as defendants as well as state officials Arizona Attorney General Terry Goddard, and the Registrar of Contractors. CV07-02496, Dkt. 1; CV07-02518, Dkt. 1.

The parties to the new lawsuits agreed to an expedited trial of the matter on January 14, 2008, based on stipulated facts and written evidence to be jointly submitted to the court. CV07-02496, Dkt. 155. On February 7, 2008, the district court ruled on the merits that (1) IRCA did not expressly preempt the Act because the savings clause specifically authorized licensing sanctions such as those in the Act; (2) Congress did not occupy the field of licensing sanctions for employers of unauthorized aliens; (3) the Act does not regulate immigration; (4) the sanctions and the E-Verify requirement do not conflict with or impede Congress's purposes and objectives; (5) the Act provides due process to employers charged under the sanctions statute; and (6) the Act does not violate the Commerce Clause because it does not regulate employees completely outside of Arizona. Pet. App. at 51a-94a. Plaintiffs appealed this ruling to the Ninth Circuit.

The Ninth Circuit affirmed the district court's decision in both appeals. Pet. App. at 31a. Petitioners

requested an en banc rehearing, and the court denied their request and also issued a modified opinion affirming the district court's decision on March 9, 2009. Pet. App. 5a-25a. The Ninth Circuit concurred with the district court that IRCA did not preempt the sanctions statute because it constituted "a 'licensing' measure that falls within the savings clause of IRCA's preemption provision." Pet. App. at 19a. The Ninth Circuit similarly rejected Petitioners' claims that the Act's mandate that employers use E-Verify obstructed congressional objectives. The court noted that "Congress plainly envisioned and endorsed an increase in [E-Verify's] usage" and that the verification statute "is consistent with and furthers this purpose, and thus does not raise conflict preemption concerns." Pet. App. at 21a. The court also disposed of Petitioners' due process claim – which they have not raised as an issue before this Court – and noted that the Act provided employers a meaningful opportunity to be heard before a court prior to sanctions being imposed. Pet. App. at 25a.

REASONS TO DENY THE PETITION

In the absence of a circuit split, Petitioners are left to argue that the Ninth Circuit decision was wrong and that, although this Court does not usually grant certiorari to correct lower court errors, it should do so in this case because of the importance of the issue. Petitioners' starting premise is correct: there is no circuit conflict and only time will tell whether one will arise. But Petitioners are wrong in arguing that

the Ninth Circuit decision is erroneous and that error-correction review is appropriate in this case. The Ninth Circuit faithfully applied the plain language of IRCA and well-established preemption doctrine. There is no pressing need for this Court's intervention.

I. The Ninth Circuit Correctly Construed the Savings Clause in 8 U.S.C. § 1324a(h)(2) and Correctly Rejected Petitioners' Implied Preemption Arguments.

A. Preemption and Employer Sanctions.

The Ninth Circuit is the first court of appeals to address IRCA's language in 8 U.S.C. § 1324a(h)(2) preserving State authority to impose sanctions "through licensing and similar laws" against businesses that employ unauthorized aliens. As the lower courts correctly concluded, Arizona's sanctions fall within the parameters that Congress expressly established in this IRCA provision.

The lower courts' conclusion that federal law did not preempt Arizona's sanctions statute is consistent with this Court's precedent and IRCA's language in 8 U.S.C. § 1324a(h)(2). The federal government undeniably has the authority to preempt state laws imposing sanctions against employers that hire unauthorized workers, but it has not preempted the sanctions that Arizona's statute authorized. In *DeCanas v. Bica,* 424 U.S. 351 (1976), which this Court decided ten years before IRCA's enactment, the

Court upheld a California statute that established criminal penalties against employers that knowingly employed "an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." *Id.* at 352. The Court noted that the "[p]ower to regulate immigration is unquestionably exclusively a federal power [b]ut the Court has never held that every state enactment which in any way deals with aliens is . . . per se pre-empted." *Id.* at 354-55 (citations omitted).

When Congress later adopted a federal employer sanctions scheme in IRCA in 1986, it specifically addressed state authority to adopt sanctions:

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. § 1324a(h)(2) (emphasis added). The Ninth Circuit correctly concluded that Arizona's sanctions statute, which imposes sanctions against licenses, is not preempted because it falls within IRCA's savings clause for "licensing and similar laws."

Petitioners wrongly argue that the Ninth Circuit's analysis is contrary to this Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 146-47 (2002). Pet. at 21. In *Hoffman*, this Court addressed whether the NLRB could issue a remedial order for a violation of the National Labor Relations

Act that "awarded backpay to an undocumented alien who has never been legally authorized to work in the United States." *Hoffman,* 535 U.S. at 140. The case harmonizes two federal laws – the National Labor Relations Act and IRCA. *Id.* at 147-49. *Hoffman* appropriately recognized that, under IRCA, combating the employment of unauthorized workers is "central to [t]he policy of immigration law." *Id.* (Internal quotation marks omitted.) But *Hoffman* does not address federal preemption of a state law or analyze 8 U.S.C. § 1324a(h)(2). As the Ninth Circuit recognized, the question that the Court resolved in *Hoffman* is quite different from the one presented here.

Nonetheless, Petitioners cite the case in support of their field preemption argument. Pet. at 20. But field preemption requires a demonstration that a "complete ouster of state power" was "the clear and manifest purpose of Congress." *DeCanas,* 424 U.S. at 357 (quoting *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963)). And the mere fact that Congress enacted a detailed and comprehensive scheme to regulate a complex area of law does not demonstrate legislative intent to oust state authority. *DeCanas,* 424 U.S. at 359-60; *see also N.Y. Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973) ("Given the complexity of the matter addressed by Congress [related to welfare benefits] . . . , a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent."). The explicit authorization for state sanctions "through licensing and similar laws" establishes that

Congress did not completely oust state authority when it enacted IRCA. *See* 8 U.S.C. § 1324a(h)(2). Although IRCA is a comprehensive federal scheme, it expressly does not preclude all state authority to sanction employers that knowingly or intentionally employ unauthorized workers. Therefore, there is no field preemption of state sanctions, and the question in this case, which the Ninth Circuit correctly resolved, is whether Arizona's sanctions statute falls within the savings clause in 8 U.S.C. § 1324a(h)(2).

Petitioners incorrectly assert that Arizona's definition of "license" exceeds IRCA's savings clause for state sanctions "through licensing and similar laws." They assert that IRCA should apply only to "licensing in the traditional sense," which they characterize as involving "a genuine qualification to do business, such as a professional certification or permit." Pet. at 24. But Section 1324a(h)(2)'s language does not support such a limited application. As the Ninth Circuit observed, the sanctions statute's definition is consistent with the traditional definition of the term "license" as "a permission, usually revocable, to commit some act that would otherwise be unlawful." Pet. App. at 17a. IRCA's reference to state sanctions through "licensing *and similar laws*" also indicates that the savings clause is not tied to a limited definition of license. If Congress had intended to limit the savings clause to professional certifications or some other specific type of license, it could have done so.

The Ninth Circuit also correctly rejected Petitioners' argument that state sanctions may be imposed

against an employer only after there has been a federal adjudication of an IRCA violation. Pet. App. at 17a-19a. The IRCA savings clause preserves state sanctions "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). Nothing in this language makes a federal enforcement action under IRCA a prerequisite to the state's imposition of sanctions against the license of a business that knowingly or intentionally employs unauthorized aliens. Nor does any other IRCA provision require that the determination that an entity has unlawfully employed an unauthorized alien be made exclusively "by federal officials, in specialized administrative proceedings conducted under federal rules and regulations" as Petitioners allege. Pet. at 23.[4] This Court has established that

[4] Petitioners attempt to buttress their argument by citing IRCA's interaction with the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. § 1801, *et seq*., as the model Congress intended for states to use in imposing sanctions under IRCA. Pet. at 24. This provision merely authorizes the Secretary of Labor to suspend, revoke or refuse to issue a federal certificate of registration if an employer has been found to violate IRCA. 29 U.S.C. § 1813(a)(6). The AWPA does not address the preemptive effect of IRCA in the context of state sanction proceedings under the savings clause. Indeed, to the extent the AWPA touches upon state law, it demonstrates Congress's respect for the states' traditional authority in regulating employment by stating that the Federal law is "intended to supplement State law, and compliance with this chapter shall not excuse any person from compliance with appropriate State law and regulation." 29 U.S.C. § 1871.

state courts generally have the authority to resolve questions that involve either state or federal law unless federal law precludes them from doing so. *See, e.g., Tafflin v. Levitt,* 493 U.S. 455, 458 (1990) (deciding that state courts have jurisdiction to decide federal RICO claims).

Petitioners contend that legislative history shows that Congress intended state sanctions against an employer to be "tack[ed] on" to federal sanctions after a federal adjudication has occurred (Pet. at 23) based primarily on its interpretation of language in a House report regarding "persons who ha[ve] been found to have violated the sanctions provisions in this legislation." Pet. at 24. However, the statute's plain and unambiguous language, not its legislative history, controls the analysis. *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 568 (2005) (the "authoritative statement is the statutory text, not the legislative history"). Even so, the lower courts correctly noted that the legislative history itself contradicts Petitioners' interpretation because it "recognizes states can condition an employer's 'fitness to do business' on hiring documented workers." Pet. App. at 18a. Thus, the Ninth Circuit correctly concluded that a federal adjudication under IRCA need not precede a state enforcement action against an employers' license.

Petitioners argue that Arizona's sanctions statute undermines the uniformity that Congress desired and imposes burdens on employers. But as the Ninth Circuit observed, Arizona's sanctions statute "is

premised on enforcement of federal standards as embodied in federal immigration law." Pet. App. at 19a. Arizona uses the federal definition of "unauthorized alien," A.R.S. § 23-211(11), and county attorneys may rely only on information from the federal government to establish an employee's immigration status in any enforcement proceeding A.R.S. § 23-212. Arizona's law does not impose any new obligation on employers because, since IRCA's enactment in 1986, federal law has prohibited them from employing unauthorized aliens. Arizona's law simply provides for the type of state sanctions that Congress authorized states to impose when it enacted IRCA.

Because this case involves a preenforcement, facial challenge of the Act, it does not address a case in which sanctions against an employer were actually imposed through a state court proceeding. None of the Petitioners has been the subject of any enforcement action, and no enforcement action has been filed against any employer under the Act.

In sum, the lower court correctly resolved the question of whether IRCA preempts Arizona's sanctions statute, and this Court should deny review of that issue.

B. The Ninth Circuit's Analysis of Arizona's E-Verify Requirement Is Consistent with This Court's Precedent and the Relevant Congressional Enactments.

The Ninth Circuit's analysis of whether federal law preempts a state from requiring employers to use the federal E-Verify program is also consistent with this Court's precedent. *See* Pet. App. at 21a. In conducting its conflict preemption analysis, the Ninth Circuit considered whether the E-Verify requirement "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Pet. App. at 20a (internal quotation marks omitted). The statute creating the E-Verify program provides that the Secretary of Homeland Security cannot "require any person or other entity to participate in a pilot program." IIRIRA, Pub. L. No. 104-208, § 402(a), 110 Stat. 3009-655, 3009-656 (1996). Although Congress prohibited the federal government from making the E-Verify program mandatory, it did not preclude state policymakers from requiring its use.

The Ninth Circuit correctly applied this Court's conflict preemption principles in upholding Arizona's E-Verify requirement. The E-Verify requirement does not create an obstacle to the "full purposes and objectives of Congress" in creating the E-Verify program. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) (internal quotation marks omitted). Petitioners assert that the Ninth Circuit erred because the verification

statute conflicts with Congress's intent to make the E-Verify program a voluntary one. Pet. at 27. But as the Ninth Circuit recognized, Congress's purpose in creating the E-Verify program was to create a more effective verification program. Pet. App. at 9a (noting purpose of IIRIRA to "ensure efficient and accurate verification any new employee's eligibility for employment"). That purpose is furthered if employers use the E-Verify program, as Arizona requires them to do.

In addition, the record in this case included the federal Department of Homeland Security materials illustrating the agency's commitment to improving and expanding the E-Verify program and indicating that the agency was providing technical assistance to assist in state efforts to expand the program. *See* The White House – President George W. Bush, Office of the Press Secretary, *Fact Sheet: Improving Border Security and Immigration Within Existing Law*, CV07-02496, Dkt. 149, Ex. 16 at 3. Federal program evaluations of E-Verify indicated that increased use would enhance the program's effectiveness. *See* Westat, *Findings of the Web Basic Pilot Evaluation* (Sept. 2007), CV07-02496, Dkt. 152, Ex. 52 at xxi-xxii (noting that E-Verify's limited use "place[es] limitations on its effectiveness in preventing unauthorized employment on a national basis"); *id.* at 147 (noting that increasing E-Verify's use enhances its "ability to deter unauthorized employment"). Arizona's E-Verify requirement supports the federal government's efforts to improve the verification process through E-Verify's expanded use.

As the Ninth Circuit correctly concluded, Petitioners' reliance on this Court's decision in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000) to support their conflict preemption argument is misplaced. Pet. App. at 20a-21a. *Geier* dealt with a Department of Transportation (DOT) regulation that gave automobile manufacturers a choice as to which passive restraint systems to use in their cars and required only ten percent of a manufacturer's production to include airbags. *Geier,* 529 U.S. at 879. By allowing this flexibility, the federal government intended to "encourage competition among automobile manufacturers to design effective and convenient passive-restraint systems." Pet. App. at 20a. The Court in *Geier* determined that state tort liability arising from the failure to use airbags would negate the flexibility that the DOT regulation afforded because manufacturers would likely abandon the attempt to develop new passive restraint systems and install airbags in all of their cars to avoid the prospect of tort damages. *Geier*, 529 U.S. at 881. Thus, the federal regulation preempted state tort law because it created an obstacle to the accomplishment of a federal objective. *Id.* at 886.

The Ninth Circuit correctly recognized that unlike the state tort law at issue in *Geier*, Arizona's requirement that employers use E-Verify furthers Congress's objectives. Pet. App. at 21a. The court correctly observed that Congress's actions in extending and expanding the E-Verify program and its availability demonstrate that Congress "plainly

envisioned and endorsed an increase in its usage." *Id.* Rather than undermining the development of federal objectives, as the state law did in *Geier*, Arizona's requirement supports federal goals for the E-Verify program by increasing the number of users and facilitating the federal government's ongoing efforts to expand and improve this electronic verification program. Thus, the Ninth Circuit correctly held that Petitioners' conflict preemption argument fails because Arizona's law is consistent with and furthers the purpose of the E-Verify program. *Id.* This Court should therefore deny review of this decision.

II. There Is No Circuit Split on the Issues That Petitioner Raises in This Case.

As Petitioners concede, no other circuit court has addressed either preemption issue that this case raises.[5] Pet. at 20. At least four other district courts have addressed related issues, but no other circuit court has addressed the preemption issues in question. In *Lozano v. City of Hazleton,* 496 F. Supp. 2d 477 (M.D. Pa. 2007), a district court invalidated a

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[5] Other circuit court decisions have addressed whether IRCA preempts state and local employment and tort law, but those cases did not involve an analysis of 8 U.S.C. § 1324a(h)(2). *See, e.g., Incalza v. Fendi N. Am., Inc.,* 479 F.3d 1005 (9th Cir. 2007) (concluding that IRCA did not preempt California employment law); *Madeira v. Affordable Housing Found., Inc.,* 469 F.3d 219 (2d Cir. 2006) (concluding that IRCA did not preempt New York law governing tort recovery for injured workers).

local ordinance that authorized local sanctions against employers of unauthorized aliens, required employers to use the E-Verify program, and required people seeking to rent apartments to prove their legal status. As Petitioners indicated, that decision is currently on appeal. Pet. at 19; *see Lozano v. City of Hazleton*, 3rd Cir., Dkt. 07-3531. A district court in Oklahoma also granted a preliminary injunction against a state law requiring contractors with public entities to use a "Status Verification System," making it a discriminatory practice to discharge a U.S. citizen while retaining an employee that the employer knows or should have known is an unauthorized alien, and imposing additional tax withholding requirements for employers that fail to use the employment eligibility system. *Chamber of Commerce v. Henry*, No. 08-109, 2008 WL 2329164 at *8 (W.D. Okla. June 4, 2008). That decision has been appealed to the Tenth Circuit. *Chamber of Commerce v. Henry*, 10th Cir., Dkt. 08-6127. Meanwhile, another district court upheld a city ordinance penalizing businesses employing unauthorized aliens against similar claims of preemption. *Gray v. City of Valley Park*, No. 07-00881, 2008 WL 294294 at *31 (E.D. Mo. Jan. 31, 2008), *aff'd on other grounds*, 567 F.3d 976 (8th Cir. 2009). The federal government also successfully challenged an Illinois law that prohibited the use of E-Verify, as the district court in that case concluded that banning participation in the federal program undermined Congressional objectives. *See United States v. Illinois,* No. 07-03261, 2009 WL 662703 (C.D. Ill. March 12, 2009). No appeal was filed in that case.

Thus, related issues are percolating through the lower courts, but there is no circuit split regarding the scope of the preemption provision in 8 U.S.C. § 1324a(h)(2) or preemption of State E-Verify requirements that requires this Court's review.

III. Petitioners Should Direct Their Concerns About State Sanctions and State E-Verify Requirements to Congress.

Petitioners urge this Court to accept this case to avoid the burdens of state regulation and ensure uniform enforcement of our immigration laws. But in 8 U.S.C. § 1324a(h)(2), Congress explicitly preserved state authority to impose sanctions "through licensing and similar laws." Sanctions against a business's license may carry serious consequences, but Congress plainly left states the discretion to provide for such sanctions. Petitioners may disagree with the impact of permitting states to impose sanctions through state licensing laws and may favor more restrictions on state authority, but that is a matter for Congress to address. The lower courts correctly resolved the IRCA preemption issue raised here.

Petitioners also express their concern about the accuracy of the E-Verify program to support their claim that states cannot require employers to use this federal program. But, Congress has demonstrated its confidence in the program by making it available for use nationally, and the Department of Homeland Security continues to strengthen and expand the

program. *See* 48 C.F.R. § 22.1802 (2009) (mandating that federal solicitations and contracts include a provision requiring use of E-Verify for eligibility verification of new employees).[6] Preemption principles permit Arizona's policy makers to assess the benefits and weaknesses of the E-Verify program, consider the policy concerns such as those expressed by Petitioners, and determine whether to require its use by Arizona employers. Arizona is not creating its own verification system. It is merely requiring employers to use a federal program for the purpose for which the federal government developed it – to help ensure that employees are legally authorized to work in this country. Petitioners also suggest Arizona's law may result in increased racial discrimination by employers. Pet. at 17. But that is pure speculation, and other laws at the state and federal levels protect against discrimination. *See* 8 U.S.C. § 1324b (defining and prohibiting unfair immigration-related employment practices); 42 U.S.C. § 2000e-2 (prohibiting discrimination based on "race, color, religion, sex, or national origin"); A.R.S. § 41-1463(B) (prohibiting employment discrimination based on "race, color, religion, sex, age, disability or national origin").

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[6] *See also* Department of Homeland Security, Office of the Press Secretary, *Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify* (July 8, 2009), available at http://www.dhs.gov/ynews/releases/pr_1247063976814.shtm (last visited Sept. 17, 2009).

This Court has consistently recognized that, subject to other constitutional restrictions, states have a legitimate interest in addressing the local problems that may be associated with the problem of illegal immigration. *DeCanas,* 424 U.S. at 357; *see also Plyler v. Doe*, 457 U.S. 202, 225 (1982) ("[T]he States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal."). Congress has also recognized that concern by preserving state authority in IRCA (8 U.S.C. § 1324a(h)(2)) and enacting legislation that encourages state and federal cooperation on immigration-related issues, *see, e.g.,* 8 U.S.C. § 1373; 8 U.S.C. § 1644 (prohibiting states and local governments from being prevented from exchanging information with federal authorities regarding the immigration status of individuals). States have a significant interest in addressing the affects of illegal immigration in their communities and may serve as effective laboratories that will inform the national debate concerning immigration policy.

When she approved the Legal Arizona Workers Act, former Arizona Governor Napolitano indicated that the legislation was borne out of frustration with national immigration policy. CV07-02496, Dkt. 148, Ex. 2. The "flood" of state legislation that Petitioners describe may also reflect that frustration. Pet. at 14. But that is not a problem this Court can solve. Indeed, Congress is currently considering bills that would make E-Verify a permanent program, gradually phase-in required usage of E-Verify by all employers,

and require certain contractors to use E-Verify.[7] *See, e.g.,* S.1505, 111th Cong. § 201 (2009); H.R. 2083, 111th Cong. (2009). The most recent customer guide posted on the USCIS website regarding E-Verify also demonstrates federal support for the expanded use of E-Verify through state-mandated use of the program because it encourages employers to "check to see if their state law requires participation in E-Verify." USCIS *I Am an Employer . . . How Do I . . . Use E-Verify?* (Form M-655, 8/08), available at http://www.uscis.gov/files/article/E4eng.pdf (last visited Sept. 16, 2009).

Petitioners claim that only this Court "can provide the clarity and uniformity" necessary to regulate employment of unauthorized aliens. Pet. at 19. They are wrong. The Ninth Circuit provided the correct analysis of the preemption issues that this case raises. Any further "clarity or uniformity" is a matter for Congress, not this Court.

[7] *See, e.g.,* Andorra Bruno, *Electronic Employment Eligibility Verification*, Congressional Research Service, at 4-5 (March 13, 2009), available at http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-CRS-rpt-2009-03.pdf (last visited Sept. 17, 2009).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

TERRY GODDARD
Attorney General of Arizona
MARY O'GRADY
Solicitor General
CHRISTOPHER A. MUNNS
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2997

Counsel for Respondents Arizona Governor Janice K. Brewer, Department of Revenue Director Gale Garriott, and William Mundell, Registrar of Contractors

[Additional Counsel Listed On Inside Cover]