No. 09-115

IN THE

# Supreme Court of the United States

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

v.

CRISS CANDELARIA *et al.*,
*Respondents.*

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

## REPLY BRIEF


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## REPLY BRIEF

The Brief in Opposition is most important for what it does not say. Strikingly, respondents do not challenge the fundamental national importance of the issues underlying the Petition. *E.g.*, Opp. 3. They also do not meaningfully dispute the conflict between the decision below and *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137 (2002), confining themselves to a cursory repetition of the Ninth Circuit's assertion that *Hoffman* was about displacement of federal regulation rather than preemption of state law. In short, the principal reasons justifying this Court's review are not really contested. Respondents instead devote their Opposition principally to a discussion of the merits. Opp. 12-22. Their arguments on this score are wrong, for the reasons we previously articulated, Pet. 22-27; more fundamentally, they further demonstrate the important and interesting nature of these issues, supporting rather than undermining the case for review.

For all of these reasons, reviewing the decision below is not mere "error-correction." Opp. 13. The recent (and continuing) flood of state and local legislation already is imposing severe burdens on employers and employees alike, and it is those high stakes—not "two narrow preemption questions," *id.* at 1—that amply justify this Court's review. The Petition should be granted.

### I. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE.

A. Respondents forthrightly acknowledge the importance of the issues in this case. They recognize "immigration's importance as a public-policy issue in this country" and the "general importance of immi-

gration policy." Opp. 3. They do not disagree that there now exists a cacophony of differing state and local immigration regulations across the country, creating a shadow immigration policy that disrupts the uniform scheme at the heart of federal immigration law. Pet. 2-3 & nn.1-2, 14-17 & nn.7-9; Br. of Business Organizations as *Amici Curiae* 13-20 & nn.3-17. They do not dispute that this fractured system is imposing severe costs—today—on employers, particularly those with multi-state operations. Pet. 17-18; see Business Organizations Br. 7-13, 20-21. And, they also do not gainsay the showing that such legislation imposes costs on employees.[1] This intolerable situation calls out for review, or at least for enlisting the views of the Executive Branch. See 78 U.S.L.W. 3170 (Oct. 5, 2009) (order calling for the views of the Solicitor General in Nos. 08-1515, *Golden Gate Restaurant Ass'n* v. *San Francisco*, and 08-1314, *Williamson* v. *Mazda Motor*, concerning questions of federal preemption).

B. The national scope of this problem cannot be ignored, as respondents suggest, on the theory that only the Arizona statute is directly at issue here. Opp. 2. Common sense dictates—as this Court long has held—that a critical consideration in assessing a case's "importance" for purposes of certiorari review is its potential impact on other cases and parties.

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[1] Pet. 17-18. *See generally* Br. of *Amici Curiae* National Employment Law Project et al.; Br. of *Amici Curiae* Asian American Justice Center et al.

Respondents deride as "pure speculation" that the enactment of such state laws may result in increased discrimination. Opp. 25. This is not "speculation," but the considered policy judgment of Congress, and is confirmed by a report commissioned by the Department of Homeland Security, *see* Pet. 17-18, as the *amici* discuss at length.

*E.g.*, *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000); see Eugene Gressman et al., *Supreme Court Practice* §§ 4.11, 4.13, 6.31(b), at 262-64, 267-70, 479 (9th ed. 2007). This is all the more true where preemption is concerned; after all, approving a particular enactment permits every state and locality to legislate in similar fashion. *See* Pet. 11-12.

Here, as respondents do not dispute, thousands of immigration-related bills and resolutions have been introduced in states and localities across the country in recent years, proposing or imposing competing and conflicting requirements on employers and employees, and threatening the "uniform" and "comprehensive" system that Congress envisioned. Pet. 14-17. This case is a good vehicle for addressing these issues because it presents two provisions that are among the most common in such state and local enactments. *Id.* at 4, 19-20, 20-27; *infra* at 6-8. Although of course a decision in this case could invalidate or uphold only the Arizona statute, it would broadly affect the legality of innumerable enactments already on the books. A decision by the Court now will spare litigants and courts the costs of litigating dozens, if not hundreds, of challenges to the existing laws and provide clear guidance to state and local governments about the scope of their powers.

C. The importance of these issues is not reduced because there is no circuit split. See Opp. 22-24. The "importance" of an issue is separate from the question whether courts have divided over it, and can justify review in the absence of any split. See Sup. Ct. R. 10(a), (c); see also Gressman et al., *supra*, §§ 4.11, 4.13, 6.31(b), at 262-64, 267-70, 479. This Court often has granted certiorari to resolve an issue of national importance when there is a divide between lower court decisions, even in the absence of an existing

split among the circuits themselves. See, *e.g.*, *Cook* v. *Gralike*, 531 U.S. 510, 518 (2001); *Murphy Bros., Inc.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 349 & n.2 (1999). Here, there is a clear division of authority among at least four district courts that addressed these and related issues, see Pet. 19-20, which respondents do not dispute, cf. Opp. 22-24.

Review by this Court is particularly warranted when, as here, delay is not only unnecessary but in fact poses significant risks. The magnitude of the problems we and the supporting *amici* have described grow more severe with each passing month, as state legislatures and local governments continue to pass conflicting rules concerning employment verification. Further delay will simply engender more litigation and greater uncertainty among courts and state officials. Pet. 18-19.

D. For closely related reasons, there is no merit to respondents' suggestion that "concerns about state sanctions and state E-Verify requirements [should be directed] to Congress" rather than this Court. Opp. 24-27. Congress already has spoken. It established a policy concerning the employment of aliens that it intended to be "comprehensive" and "uniform," *Hoffman*, 535 U.S. at 147; IRCA, Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384 (1986), including a provision that broadly and expressly preempts state laws like the one at issue here, see 8 U.S.C. § 1324a(h)(2). The question in this case is not whether Congress can or should act—it already has—but the proper interpretation of an existing federal statute. And *that* question, of course, "is the proper and peculiar province of the courts" to answer. *The Federalist* No. 78 (Alexander Hamilton); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

Indeed, action in this case is uniquely the domain of this Court. Whether the decision below conflicts with this Court's decision in *Hoffman* is a question for this Court. Pet. 20-22; *infra* at 5-6. On the fundamental preemption question, decisions by lower courts will not provide certainty or needed guidance, and indeed have not done so. Pet. 18-20. And, the prospect of further congressional action is uncertain, nor is there any reason to believe it will address the preemption issue on which Congress already spoke.

## II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *HOFFMAN*, AND MISINTERPRETS FEDERAL LAW.

A. Review additionally is warranted because of the conflict between the decision below and this Court's decision in *Hoffman*. See Pet. 20-22. As we have shown, *Hoffman* declared that IRCA established a "comprehensive scheme" for regulating the employment of undocumented aliens and "forcefully made combating the employment of illegal aliens central to the policy of immigration law." 535 U.S. at 147 (alteration and internal quotation marks omitted); see Pet. 20-22.

Respondents' sole answer is the same one the Ninth Circuit offered—that *Hoffman* concerned displacement of a federal regulation, not preemption of a state statute, and that *Hoffman* did not specifically analyze IRCA's preemption clause. Opp. 13-14. Like the Ninth Circuit, however, respondents undertake no analysis of why this distinction makes any difference. They argue that "the question that the Court resolved in *Hoffman* is quite different from the one presented here," *id.* at 14, but this naked assertion begs the important question without answering it. See also Pet. App. 16a. In fact, this distinction proves nothing—if anything, the "comprehensive" nature of

the statute can more easily coexist with federal regulation than with the chaos of statutes and ordinances by states and localities around the country. The case for preemption here is therefore stronger than even in *Hoffman*.

What is more, if there were some legitimate dispute over the application of *Hoffman*, that is more reason, not less, for this Court to grant review. See Gressman et al., *supra*, § 4.5, at 250; *e.g.*, *SEC* v. *Edwards*, 540 U.S. 389, 392-93 (2004) (granting certiorari when court of appeals misconstrued Supreme Court case as inapplicable). This is all the more true given that the question involves the continuing validity of one of this Court's precedents. See generally *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

B. As previously noted, the brief in opposition is principally devoted to arguing the merits of this case. See Opp. 12-22. These arguments are secondary at this stage, and mistaken in any event.

1. Federal law preempts state and local laws that "impos[e] 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). The Arizona statute is preempted because it imposes penalties on employers who hire unauthorized aliens. See Pet. 22-23. Respondents do not deny that the Arizona statute is preempted unless it falls within the parenthetical savings clause for "licensing and similar laws," which they claim it does. Opp. 15-18. A "licensing" statute, however, defines the qualifications that are necessary to engage in a particular occupation, such as are contained in a professional certification or permit. Pet. 23-25. The punitive Arizona statute does not meet that standard, nor do respon-

dents claim that it does. Instead, they argue that *any* statute that would shutter a business—the "business death penalty" touted by then-Governor Napolitano, see *id.* at 9—constitutes a "license" just because it could take away the right to do business. This result is utterly counterintuitive; it would mean that the same Congress that imposed carefully graduated penalties for federal violations, see *id.* at 24-25, nonetheless intended to permit states to evade preemption whenever they impose the harshest possible sanction on businesses. See *id.* Respondents do not remotely justify this senseless result as consistent with Congress's intent, which is the ultimate touchstone of preemption.

This provision further is preempted because the savings clause was added to allow states to condition permits and licenses on a record of compliance with *federal law*, not to impose their own independent penalties for violations of state law. See H.R. Rep. No. 99-682, pt. I, at 58 (1986); Pet. 23-24. Respondents' contrary argument would permit every municipality in the country to engage in shadow enforcement of their preferred version of federal law, even in the absence of any prior adjudication by the specialized federal authorities in the specialized federal administrative process created by federal law for this very purpose. This result is not what Congress intended, see Pet. 25, and it is flatly inconsistent with the Court's admonition against giving "broad effect to savings clauses" like this one. *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000).

2. The Arizona statute also is preempted because it requires all employers in the state to use the federal "E-Verify" system to confirm work authorization status. Pet. 25-27. Respondents do not deny that federal law defines E-Verify as voluntary for employers,

but contend that the Arizona provision is not preempted because federal law does not explicitly preclude *state* mandates to use E-Verify. See Opp. 19-22. At most, this argument would defeat one particular *express* preemption argument, but it ignores the manifest conflict between the Arizona statute and the purposes of the comprehensive federal law. See, *e.g.*, *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989). Congress made E-Verify voluntary so that it could gauge employer response and determine whether the system gained acceptance and should be continued. See Pet. 25-28. If every state mandated the use of the E-Verify, this purpose would be defeated—participation would not reflect employer approval of the program, but rather state mandates. Likewise, respondents' argument ignores that Congress deliberately selected a particular *method* of accomplishing its chosen goals—the implementation of voluntary E-Verify—which the Arizona statute impermissibly thwarts. See *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987) ("A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach [Congress's] goal.").

Nor is the preemption analysis different because, as respondents claim, the federal government has "'plainly envisioned and endorsed an increase in its usage.'" Opp. 21-22 (quoting Pet. App. 21a). On the contrary, Congress has carefully and incrementally made modest expansions to E-Verify's duration and geographic reach, which directly undermines the suggestion that Congress would "'endorse[]'" radical expansions in the program of the sort at issue here.

## CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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