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

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, *ET AL.*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE* [1]

The *amici curiae* listed below are non-profit organizations that share a common interest in advancing and protecting the civil rights of all persons, including those of immigrants:

- Asian American Justice Center
- Asian American Institute
- Asian Pacific American Legal Center of Southern California
- La Raza Centro Legal
- LatinoJustice PRLDEF
- Lawyers' Committee for Civil Rights Under Law
- League of United Latin American Citizens
- Los Abogados Hispanic Bar Association
- National Council of La Raza
- National Day Laborer Organizing Network
- Southern Poverty Law Center

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae's* intention to file this brief. The letters of consent have been filed with, or will be sent to, the Clerk.

Each organization is committed to preventing discrimination against employees, including those who may look or sound foreign. Each organization has a strong interest in opposing state laws that regulate employment of unauthorized workers, including the Legal Arizona Workers Act (the "Arizona statute"),[2] because those laws interfere with federal laws specifically designed to prevent discrimination. *Amici* support the Petition for a Writ of Certiorari and submit that review should be granted. This brief highlights Congress' long-standing and well-documented desire to prevent discrimination that will result from mandatory use of the E-Verify system. The specific interest of each *amicus* is described in more detail below.

The **Asian American Justice Center** ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. Collectively, AAJC and its affiliates—the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California—have over fifty years of experience in litigation, public policy, advocacy, and community education on discrimination issues. AAJC has advanced its long-standing concern for protecting the rights of immigrants—a significant proportion of whom are Asian Americans—by filing briefs in immigration cases and educating policymakers and the public on the need for fair and humane immigration laws.

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2. Other states that require or will require all employers to use E-Verify are Mississippi and South Carolina. *See* Miss. Code Ann. § 71-11-3; S.C. Code Ann. 41-8-20.

The **Asian American Institute** ("AAI") is a pan-Asian, non-partisan, not-for-profit organization located in Chicago, Illinois, whose mission is to empower and advocate for the Asian American community through advocacy, coalition-building, education, and research. AAI's programs include community organizing, leadership development, and legal advocacy. AAI is deeply concerned about the discrimination that Asian Americans face in hiring and employment practices, including discrimination against those who look or sound foreign. Laws such as the Arizona statute worsen discrimination against Asian American members of the workforce and frustrate Congress' intent to balance immigration control concerns with discrimination concerns. Accordingly, AAI has a strong interest in the outcome of this case.

The **Asian Pacific American Legal Center of Southern California** ("APALC") was founded in 1983 and is the nation's largest non-profit public interest law firm devoted to the Asian Pacific American community. Serving 15,000 individuals and organizations each year, APALC has expertise in workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights, and hate crimes. APALC represents and advocates for immigrants through public advocacy, community education, and litigation to ensure their protection against discrimination, and it has assisted individuals wrongly identified under the E-Verify system. APALC has a long-standing interest in this case because the mandatory implementation of a flawed employment verification program significantly impacts Asian Pacific Americans.

La Raza Centro Legal is a community-based legal organization dedicated to empowering Latino, immigrant and low-income communities of San Francisco to advocate for their civil and human rights. It combines legal services, organizing, advocacy, and social services to build grassroots power and alliances towards creating a movement for a just society. Through all of its work, La Raza Centro Legal provides the highest quality legal representation, services, and advocacy for low income communities, workers who experience workplace abuses, and immigrants. Through its Legal Services and Day Labor Programs, La Raza Centro Legal advocates for the rights of low wage immigrant workers. It has a strong interest in protecting immigrant workers from workplace abuses.

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) is a non-profit, non-partisan civil rights organization founded in New York City in 1972. Its continuing mission is to advocate for and defend the constitutional rights of all Latinos under the law. It seeks to accomplish this by promoting the civic participation of the pan-Latino community, cultivating Latino community leaders, and bringing impact litigation addressing the basic civil and human rights of Latinos in employment, education, language, fair housing, immigrants' and migrants' rights. During its 37-year history, LatinoJustice has litigated numerous cases on behalf of the Latino community against multiple forms of discrimination. LatinoJustice PRLDEF has argued landmark civil rights cases that have had profound implications for all Latinos.

The **Lawyers' Committee for Civil Rights Under Law** ("Lawyers' Committee") is a tax-exempt, non-profit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee has been involved in challenging state statutes and municipal ordinances that require private citizens to act as immigration officials and provide incentives for employers to discriminate against authorized workers of color in violation of federal civil rights laws.

The **League of United Latin American Citizens** ("LULAC") has a mission to advance the economic condition, educational attainment, political influence, housing, health and civil rights of the Hispanic population of the United States. LULAC achieves its mission through advocacy, education and litigation, including filing briefs in immigration and civil rights cases that have a substantial impact on the Hispanic population and other ethnic groups.

Los Abogados Hispanic Bar Association ("Los Abogados") is an Arizona-based non-profit and non-partisan organization that focuses on promoting the business of the Hispanic legal profession within the state of Arizona. Members of Los Abogados include private

and public attorneys, judges, businesspersons, paralegals, and law students. Los Abogados has actively opposed actions directed at immigrants that can be used to marginalize Hispanics in general. This has been done by participating in community-based outreach activities, assisting in the prosecution of civil rights lawsuits and investigations of civil right abuses, and educating Arizona's courts, media, and higher-learning institutions on issues that negatively affect immigrants and Hispanics.

The **National Council of La Raza** ("NCLR") is a private, non-profit, non-partisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis and advocacy. NCLR believes that state laws that regulate employment of immigrants and mandate the use of a flawed employment verification program result in large-scale discrimination against workers perceived to be foreign, and are preempted by federal immigration laws.

The **National Day Laborer Organizing Network** ("NDLON") is a nationwide coalition of day laborers and non-profit agencies that work with and for day laborers. Its mission is to improve the lives of day laborers in the United States. The aims of the coalition include working for the repeal or invalidation of laws that restrict day laborers' rights to seek and receive employment with full workplace protections. NDLON considers it among its

highest strategic priorities to vindicate and defend day laborers' civil and workplace rights. NDLON has expended resources to respond to the Arizona statute. Additionally, NDLON feels many of its constituents have been adversely impacted by the Arizona statute. Among NDLON's member organizations is the Macehualli day labor center in Phoenix, Arizona.

Founded in 1971, the **Southern Poverty Law Center** ("SPLC") has litigated numerous civil rights cases on behalf of women, people of color, prisoners, immigrants and other victims of discrimination. Although the SPLC's work is concentrated in the South, its attorneys appear in courts throughout the country to ensure that all people receive equal and just treatment under federal and state law.

SUMMARY OF ARGUMENT

Undersigned *amici* strongly urge this Court to review the decision below, which presents an issue of national importance. Statutes like Arizona's, whatever their stated purpose, have the effect of fostering discrimination. Specifically, and critical to the preemption analysis that should resolve this case, Congress has well understood that employer verification and sanction programs can result in discrimination against authorized workers, especially those who sound or appear foreign. To avoid sanctions for employing unauthorized workers as well as to avoid the costs associated with resolving verification problems under

E-Verify,[3] employers may decline to consider or employ workers who they believe look or sound foreign, because they presume such workers are unauthorized or, at a minimum, will have problems proving they are authorized under E-Verify.

Congress recognized this threat of discrimination when it considered legislation imposing sanctions for employing unauthorized workers, and it sought to craft legislation that prevented unintended discrimination. As discussed below, Congress has shaped federal immigration law to balance the federal government's interest in controlling illegal immigration with its interest in preventing discrimination against U.S. citizens and other authorized workers. Indeed, when it first imposed sanctions for employing unauthorized workers under the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. §§ 1324a-1324b), Congress attempted to strike this balance by incorporating anti-discrimination provisions into IRCA. Moreover, when Congress created the E-Verify program in 1996 through passage of IIRIRA, Congress continued its balancing effort by choosing to keep employer enrollment in E-Verify voluntary and temporary, subject to renewal.

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3. Congress created a pilot electronic verification program (the federal Basic Pilot Program (now titled "E-Verify")) with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1324a).

Review by this Court is required to preserve Congress' balancing of strong concerns regarding discrimination with effective immigration control through its decision to make E-Verify voluntary and temporary. Permitting states, such as Arizona, to disrupt that balance by making E-Verify mandatory and permanent would give rise to the very discrimination that Congress has expressly sought to prevent.

ARGUMENT

I. THE ARIZONA STATUTE AND OTHER SIMILAR STATE LAWS CONFLICT WITH FEDERAL LAW AND ARE PREEMPTED.

Amici support Petitioners' position that review should be granted because of the significance of the issues presented. By requiring participation in E-Verify and imposing sanctions for employing unauthorized workers, the Arizona statute and similar state laws allow discrimination against U.S. citizens and other authorized workers contrary to congressional intent. These state laws are preempted by federal immigration law.

As set forth in the Petition for a Writ of Certiorari, IRCA created a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002). IRCA was the product of years of deliberation and of difficult compromises that carefully balanced myriad, competing policy and political concerns. *See* Pet. 5-6, 12-13. Thus, while Congress prohibited employers from hiring undocumented

immigrants, it included a strict *scienter* requirement (8 U.S.C. § 1324a(a)(1)(A)); imposed relatively mild penalties for initial infractions (*id.* § 1324a(e)(4)); and balanced its ban on knowingly hiring unauthorized workers with its ban on discrimination on the basis of national origin or citizenship status (*id.* § 1324b(a)(1)). Congress achieved this balance with deliberate precision: Congress imposed the exact same graduated scale of penalties for violating section 1324a (ban on hiring unauthorized workers) as for violating section 1324b (ban on discrimination). Thus, first offenders of section 1324a face penalties of $250 to $2000 (*id.* § 1324a(e)(4)(A)(i)), as do first offenders of section 1324b (*id.* § 1324b(g)(2)(B)(iv)(I)). Second offenders of each section both face penalties of $2000 to $5000, and third offenders of each section both face penalties of $3000 to $10,000. *Compare id.* § 1324a(e)(4)(A) *with id.* § 1324b(g)(2)(B)(iv).

Congress sought to preserve this balance when it subsequently enacted IIRIRA and established E-Verify as an experimental pilot program to verify electronically the employment authorization of newly hired employees. To limit the discrimination that E-Verify could cause, Congress made the program voluntary and temporary. When Congress renewed E-Verify in 2003, it kept the program voluntary as part of a comprehensive immigration policy that balanced the prevention of employment of unauthorized workers with the possibility of discrimination resulting from E-Verify.

Even if the goals of federal and state law are the same, a state law "is preempted if it interferes with the methods by which the federal statute was designed to

reach this goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Conflict preemption will invalidate a state statute that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). Although the Ninth Circuit held that the Arizona statute was not preempted, it relied on *De Canas v. Bica*, 424 U.S. 351 (1976), which pre-dates both the enactment of IRCA and this Court's decision in *Hoffman*. *Hoffman* held that the National Labor Relations Board could not award backpay to an unauthorized worker because such an award would "subvert[]" IRCA. 515 U.S. at 150. Here, the Arizona statute would just as surely subvert federal immigration policy.

The Arizona statute and other state laws make participation in E-Verify mandatory and permanent even though Congress made it voluntary and temporary. Requiring participation in E-Verify (and failing to include anti-discrimination provisions) upsets the careful balance struck by Congress, fundamentally altering the way Congress sought to address discrimination and the employment of unauthorized workers. In doing so, the Arizona statute and other similar state laws have become an obstacle, thwarting Congress' intended objective of minimizing discrimination caused by E-Verify. In fact, it appears that the Arizona statute has already resulted in the types of discrimination that Congress sought to avoid. Shortly after the Arizona statute was enacted in 2007, immigration lawyers, industry groups and employers

reported that they noticed "an increase in hostility toward Hispanic workers." [4]

As discussed below, Congress sought to minimize the discrimination resulting from E-Verify by keeping participation in E-Verify voluntary and temporary, at least until it could assess the potential effects of the program. The Arizona statute and similar state laws—which seek to short-circuit this process and force businesses to use E-Verify (to the exclusion of other verification options approved by Congress)—conflict with federal law and are preempted.

II. STATE LAWS REQUIRING MANDATORY PARTICIPATION IN E-VERIFY FRUSTRATE CONGRESS' INTENT TO BALANCE DISCRIMINATION CONCERNS WITH CONTROL OF ILLEGAL IMMIGRATION.

In IRCA, IIRIRA and related legislation, Congress deliberately intended to preempt state statutes like the Arizona statute. It did so in order to control the nation's borders and regulate the hiring of aliens, without causing discrimination against authorized workers who some may perceive as looking or sounding foreign. This rationale for making E-Verify voluntary and temporary is well documented: when it created E-Verify by passing IIRIRA, Congress mandated that the Attorney General submit reports on pilot programs to the House and Senate Judiciary Committees. The Attorney General delegated this responsibility to the Immigration and

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4. Daniel González, *Taunts, Threats as Law Nears*, The Arizona Republic, Sept. 30, 2007, at A1.

Naturalization Service ("INS"), and in 2002, the Institute for Survey Research of Temple University and Westat prepared a report on behalf of the INS titled "Findings of the Basic Pilot Program Evaluation" (the "2002 Evaluation").[5]

The 2002 Evaluation describes the history of Congress' concern about discrimination and analyzes the relationship between E-Verify and discrimination. Congress had the report in hand when it passed legislation in 2003 to extend E-Verify through November 2008 and keep the program voluntary.[6] The threat of E-Verify-related discrimination has been, and continues to be, a major consideration for Congress in its decision to keep E-Verify voluntary and temporary.

A. Congress Was Concerned About Discrimination Both Before And During The Creation Of E-Verify.

In September 1996, IIRIRA created the "Basic Pilot" program, which is now called the E-Verify program. The program was first known as the "Basic

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5. An electronic copy of the 2002 Evaluation may be found on the website of U.S. Citizenship and Immigration Services at: www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9cc5d0676988d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=2c039c7755cb9010VgnVCM10000045f3d6a1RCRD.

6. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 (Dec. 3, 2003) (extending term of E-Verify and expanding availability to all 50 states, but keeping program voluntary and temporary to permit further study and evaluation).

Pilot" because it was (and still is) a means for the INS (whose functions are now performed by three agencies under the newly created Department of Homeland Security ("DHS")) and Social Security Administration ("SSA") to evaluate on a pilot basis methods of electronically verifying the employment authorization of newly hired employees. Because of its pilot status, E-Verify was voluntary and experimental, and remains so to this day.[7] Initially, E-Verify was to run for four years; later legislation has reauthorized it on a temporary and voluntary basis.

From the time Congress first began considering employer sanctions and employment verification as a means to address the employment of unauthorized workers, it has been concerned about the discrimination that such legislative action could cause:

> • In its 1980 report to the President and Congress titled "The Tarnished Golden Door," the U.S. Commission on Civil Rights "recommended unequivocally against passage

7. A recently adopted federal regulation would make E-Verify mandatory for only certain federal contractors and subcontractors. Federal Acquisition Regulation, 73 Fed. Reg. 67,651 (Nov. 14, 2008); s*ee Chamber of Commerce v. Napolitano*, No. 8:08-cv-3444 (D. Md. filed Dec. 23, 2008) (challenging the legality of the regulation); Federal Acquisition Regulation, FAR Case 2007-013, Employment Eligibility Verification, 74 Fed. Reg. 26,981 (June 5, 2009) (extending effective date of regulation to September 8, 2009). That regulation, however, does not make E-Verify mandatory for all employers and certainly does not negate the concerns regarding discrimination that Congress expressed at the time it established E-Verify as a voluntary program.

of employer sanctions legislation" because the "likely consequences . . . would be ineffectiveness, prescreening of job applicants, discrimination, and placement of employers in the role of immigration officers." 2002 Evaluation at 7.

• On April 30, 1981, the Select Commission on Immigration and Refugee Policy issued a report about its "comprehensive study of the major facets of immigration law" and stated that any employment verification system should incorporate "uniform and nondiscriminatory application." 2002 Evaluation at 8.

• "As a result of years of debate and widely held concerns about the probable discriminatory impact of employer sanctions on foreign-appearing and foreign-sounding workers, IRCA included significant anti-discrimination provisions for unfair immigration-related employment practices." 2002 Evaluation at 9.

• "IRCA also included several reporting requirements. It charged the General Accounting Office (GAO) with preparing a series of three reports to determine if employer sanctions were carried out satisfactorily, if they caused a pattern of discrimination against U.S. citizens or other authorized workers, and if sanctions caused an unnecessary regulatory burden on employers . . . . On March 29, 1990, GAO issued its final report, finding that the implementation of employer sanctions had

> resulted in a widespread pattern of discrimination against authorized workers and that a substantial amount of these discriminatory practices had apparently resulted from IRCA." 2002 Evaluation at 11-12 (footnote omitted). State and local studies and nongovernmental reports on employer sanctions likewise found that employer sanctions led to discrimination in the workplace. 2002 Evaluation at 13.
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> • "In [its] 1990 report to Congress indicating a pattern of widespread discrimination, GAO noted significant employer confusion on how to comply with the verification provisions." 2002 Evaluation at 27.

The legislative history of IRCA confirms the serious concern with which Congress has viewed the discrimination that could flow from employer sanctions. The House Report states, "Numerous witnesses over the past three Congresses have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members. These witnesses are genuinely concerned that employers, faced with the possibility of civil and criminal penalties, will be extremely reluctant to hire persons because of their linguistic or physical characteristics." H.R. Rep. No. 99-682(I), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5672. During the debate in Congress, it was observed that, "when an employer, particularly one who does not have elaborate personnel and legal departments, is faced with the potential of civil

and criminal penalties, that employer, for totally nonracist reasons, may, when in doubt with respect to the legal status of an applicant, decide to protect himself by excluding that applicant." 132 Cong. Rec. H9708-02 (daily ed. Oct. 9, 1986) (statement of Rep. Berman). *See also* 131 Cong. Rec. S11414-03 (daily ed. Sept. 13, 1985) (statement of Sen. Levin) ("We do not want people discriminated against because they look or sound foreign.").

The Executive Branch has also expressed concerns about potential discrimination caused by pilot programs such as E-Verify. In 1995, President Clinton issued a directive to the heads of all executive departments and agencies proposing a blueprint of policies and priorities for curtailing illegal immigration. That directive "reiterated that strong anti-discrimination measures must continue to protect the privacy and civil rights of all persons lawfully in the United States and directed an interagency effort to ensure that these rights were vigorously protected." 2002 Evaluation at 19.

In response to President Clinton's directive, in 1995 the Immigration Verification Subgroup of the Interagency Working Group on Immigration (the "Working Group") issued a report following "a lengthy consideration of complex issues related to discrimination and employment verification." The report stated that any review of employment verification pilot programs should "address potential discrimination in the design of the pilots themselves" and "ensure that an effective evaluation mechanism was in place to determine whether the pilots led to discrimination." 2002 Evaluation at 21. The Working Group report also recommended that "pilot

design should safeguard against prescreening of applicants prior to hire, selective or inconsistent implementation of the verification process, and unauthorized use of verification information for the purpose of harassment or discrimination."[8] 2002 Evaluation at 22.

In light of the concerns about discrimination, Congress specifically targeted discrimination in 1996 when it crafted IIRIRA and established E-Verify: "[T]he potential impact of automated employment verification on discrimination was a topic frequently discussed prior to the implementation of the pilots." 2002 Evaluation at 136. One of the four primary goals of the IIRIRA pilot programs, including E-Verify, was to "[r]educe discrimination." 2002 Evaluation at 28-29. IIRIRA itself provides for the establishment of "a pilot program confirmation system" designed and operated "to have reasonable safeguards against the system's resulting in unlawful discriminatory practices based on national origin or citizenship status, including— (A) the selective or unauthorized use of the system to verify eligibility; (B) the use of the system prior to an offer of employment; or (C) the exclusion of certain individuals from consideration for employment as a result of an perceived likelihood that additional verification will be required,

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8. Also in 1995, the National Council of La Raza issued a major report entitled "Racing Toward Big Brother – Computer Verification, National ID Cards, and Immigration Control." The report indicated that new verification systems would likely result in discrimination and that stronger labor law, border enforcement and assistance to major sending countries would be preferable to employer sanctions and "discriminatory and unproven verification systems." 2002 Evaluation at 22.

beyond what is required for most job applicants." IIRIRA § 404(d)(4).

B. Before Deciding To Keep E-Verify Voluntary And Temporary, Congress Considered The Discrimination That Might Result From E-Verify.

When Congress passed the December 2003 legislation that extended E Verify for five years and maintained it as a voluntary, temporary program, Congress had the opportunity to review extensive analysis of the discrimination that had already resulted from employers' use of E-Verify as well as the additional discrimination that could result from continued and expanded use of E-Verify. *See, e.g.,* 149 Cong. Rec. H9896 (daily ed. Oct. 28, 2003) (statement of Rep. Sanchez) (describing, during debate on the Basic Pilot Program Extension and Expansion Act of 2003, the "many problems" with E-Verify found by the 2002 Evaluation, including "inaccurate and outdated information").[9] The 2002 Evaluation devotes an entire chapter to the impact of E-Verify on discrimination, determining that there was evidence that E-Verify caused discrimination. The 2002 Evaluation identifies numerous concerns regarding the links between E-Verify and discrimination:

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9. Also, subsequent federal studies may be relevant in determining whether a federal law preempts a state's action. In *Geier*, for example, this Court considered a 1995 analysis of airbag-related injuries in determining whether a 1984 Federal Motor Vehicle Safety Standard, promulgated by the Department of Transportation under a 1966 federal law, preempted a state tort claim. 529 U.S. at 878.

• "Among employers who said the pilot would make it less likely for employers to hire immigrants, the explanation most frequently mentioned (by approximately 40 percent of employers) was their reluctance to bear the cost of training individuals who later turn out to be non-work-authorized." *Id.* at 138. Indeed, "[t]here is . . . considerable evidence that Basic Pilot employers are using the system to prescreen applicants, although E-Verify prohibits prescreening." *Id.* at 143. And findings suggested "that some Basic Pilot employers are . . . disproportionately denying employment to those receiving tentative nonconfirmations."[10] *Id.* at 140.

• E-Verify uses databases containing either SSA or INS (now DHS) data. "Most Federal officials interviewed agreed that the efficient operation of the pilot program was hindered by inaccuracies and outdated information in the INS database."[11] 2002 Evaluation at 121.

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10. A tentative nonconfirmation is the initial response from E-Verify when an employee's work authorization cannot be immediately confirmed. It does not signify that an employee is not authorized to work and is not indicative of any immigration violation.

11. A 2006 SSA study found that approximately 17.8 million SSA records contained data mismatches that could result in E-Verify nonconfirmations. Office of the Inspector General, Social Security Administration, *Accuracy of the Social Security Administration's Numident File*, A-08-06-26100, December 2006, *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf.

"[I]naccuracies in the SSA and INS databases could result in some work-authorized persons being incorrectly identified as not work-authorized. Since these persons would most likely be disproportionately foreign-born, this misidentification would result in unintentional discrimination against foreign-born employees." *Id.* at 137.

• "Employee rights are violated when employers fail to hire individuals with tentative nonconfirmations, because the employees are not given the opportunity to resolve the nonconfirmation." 2002 Evaluation at 143. "Since foreign-born employees are more likely than native-born employees to receive tentative nonconfirmations, pre-employment screening can be expected to result in discrimination . . . ." *Id.* at 140.

• The 2002 Evaluation found that many employers who used E-Verify wrongfully restricted or suspended the employment of existing employees who had to contest tentative nonconfirmations: "The Basic Pilot MOU prohibits the restriction of work assignments, pay cuts and other adverse actions against employees while they are contesting tentative nonconfirmations. However, employers do sometimes take adverse actions against employees who receive tentative nonconfirmations." 2002 Evaluation at 117. "The possibility that the Basic Pilot program could contribute to post-

hiring discrimination has been of widespread concern." *Id.* at 144. "Since individuals receiving tentative nonconfirmations are disproportionately foreign-born . . . , the impact of these actions will be discriminatory even if the employer does not intend to discriminate . . . . [I]t is reasonable to conclude that failure to follow Basic Pilot procedures during the tentative nonconfirmation period has increased discrimination against foreign-born individuals compared to native-born individuals in the time immediately following hire." *Id.* at 145.

• The E-Verify databases contain errors that result in false tentative nonconfirmations for disproportionate numbers of Hispanics and Asians. *See* 2002 Evaluation at 137. In addition, "[s]ince Hispanics and Asians are more likely than whites and blacks to be foreign-born, discrimination against foreign-born (or foreign-appearing) individuals is likely to result in increased discrimination against Hispanics and Asians in particular, as well as against foreign-born individuals generally." *Id.*

• "[I]f employers believe that verifying noncitizens through the Basic Pilot system is more burdensome than verifying citizens, the pilot may increase disparate treatment of noncitizens." 2002 Evaluation at 137.

• "Many objections to verification of work authorization stem from the fear that employers will exploit the procedures to

> discriminate against noncitizens, foreign-appearing citizens, and members of specific ethnic groups." 2002 Evaluation at 135.

As a result, Congress extended E-Verify for only a temporary period and without making participation mandatory. Congress determined that it would accept the risk of discrimination only to the limited extent that discrimination resulted from a program that was voluntary, temporary and subject to ongoing study and revision. Congress decided not to tolerate the substantially greater discrimination that it feared would result from a mandatory and permanent program. Now, however, Arizona and other states have decided on their own that the risk of such discrimination is acceptable. By making E-Verify participation mandatory and permanent, the Arizona statute and other state laws thwart Congress' carefully considered policy of balancing controls on illegal immigration with the need to prevent discrimination against U.S. citizens and other authorized workers.

C. The Risk Of Discrimination From E-Verify Remains High.

Concerns regarding discrimination resulting from E-Verify were well founded. A follow-up study of E-Verify performed by Westat for the INS (now DHS) has recently confirmed that discrimination caused or exacerbated by E-Verify remains a significant concern.[12]

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12. Although Congress has had the opportunity to make E-Verify participation mandatory for all employers each time it has extended the program, Congress has declined to do so, most recently in March 2009. *See* Pub. L. No. 110-329, 122 Stat. 3574, 3676 (2009).

According to this 2007 study, "[t]esting on a pilot basis was considered important because of the limitations of Federal data for verification purposes, the potential for workplace discrimination and privacy violations, and practical logistical considerations about larger scale implementation." Findings of the Web Basic Pilot Evaluation ("2007 Evaluation") at 5;[13] *see also* 154 Cong. Rec. H7589 (daily ed. July 30, 2008) (statement of Rep. Lofgren) (noting, during debate in 2008 on whether to extend E-Verify, that the 2007 Evaluation identified "numerous problems with how the basic pilot program works"). The 2007 Evaluation also observed that, while federal databases used for verification had improved, "further improvements are needed, especially if the Web Basic Pilot Program becomes a mandated national program. . . . Most importantly, the database used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification, especially for naturalized citizens." 2007 Evaluation at xxi. "Reducing the erroneous tentative nonconfirmation rate for naturalized citizens will take considerable time and will require better data collection and data sharing between SSA, USCIS, and the U.S. Department of State than is currently the case." 2007 Evaluation at xxvi.

Erroneous tentative nonconfirmation rates due to database deficiencies are a critical shortcoming of E-Verify that result in discrimination. The 2007 Evaluation

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13. An electronic copy of the 2007 Evaluation may be found on the website of U.S. Citizenship and Immigration Services at: http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.

recognized that the "impact of receiving an erroneous tentative nonconfirmation on discrimination can be viewed as the product of two factors—the degree to which specified groups differ in their tentative nonconfirmation rates and the size of the negative impact of receiving erroneous tentative nonconfirmations on those receiving them." 2007 Evaluation at 96.

With respect to differences in tentative nonconfirmation rates, the 2007 Evaluation reported that the "erroneous tentative nonconfirmation rate for employees who were eventually found to be work-authorized is approximately 30 times higher for foreign-born employees than for U.S.-born employees." 2007 Evaluation at 97. Moreover, in the first half of fiscal year 2007, "[t]here are dramatic differences between the erroneous tentative nonconfirmation rates for foreign-born citizens and work-authorized noncitizens . . . ." *Id.* Put differently, naturalized citizens are disproportionately affected by E-Verify errors.

The "negative impact" of receiving a tentative nonconfirmation can be significant. As discussed, E-Verify procedures prohibit employers from taking action against workers based only on tentative nonconfirmations. Just as feared, however, some employers have chosen to disregard this prohibition, harming both citizens and other authorized workers. *See* 2007 Evaluation at 100.

For example, an employer in Phoenix—an owner of fast-food restaurants—testified before a House subcommittee that the Arizona statute, which includes stiff penalties, might cause employers to prefer

"applicants who look like they . . . are U.S. citizens."[14] Authorized workers who have received tentative confirmations have experienced discrimination even after they were hired. These employees are denied work assignments, denied job benefits, and fired from their jobs.[15] As a result of receiving a tentative nonconfirmation, one employee was terminated two hours after being hired.[16] Another person received a job offer only to see it rescinded after receiving a tentative nonconfirmation, even though he later offered the employer confirmation from the SSA that he was authorized to work in the United States.[17] Some employees did not receive training while contesting tentative nonconfirmations, and some employees were paid less. 2007 Evaluation at 77.

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14. Dena Bunis, *Employment verification days are numbered*, Orange County Register, May 6, 2008, *available at* http://www.ocregister.com/ocregister/news/local/immigration/article_2035598.php.

15. Moreover, a report by a non-profit immigrant rights program found that the Arizona statute "has produced fear and resentment in the immigrant community." Caroline Isaacs, Sanctioning Arizona: The Hidden Impacts of Arizona's Employer Sanctions Law, American Friends Service Committee, January 2009, available at http://www.afsc.org/tucson/ht/a/GetDocumentAction/i/74700.

16. Alexandra Marks, *With E-Verify, Too Many Errors to Expand Its Use?*, The Christian Science Monitor, July 7, 2008, *available at* http://www.csmonitor.com/2008/0707/p02s01-usgn.html.

17. *How Errors in Basic Pilot/E-Verify Databases Impact U.S. Citizens and Lawfully Present Immigrants*, National Immigration Law Center, April 2008, *available at* http://www.nilc.org/immsemplymnt/ircaempverif/e-verify_impacts_USCs_2008-04-09.pdf.

Congress was aware of these problems when it decided to keep E-Verify voluntary and mandated further evaluation. The Arizona statute and similar state laws directly frustrate Congress' intent not to require participation in E-Verify until steps are taken to considerably reduce the error rate and its harmful effects.

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Authorized workers who look or sound foreign face increased discrimination when employers are forced to participate in the flawed E-Verify system. Congress has historically considered such discrimination to be a significant problem. *See supra* Part II.A.

When Congress passed IRCA and implemented sanctions for employing unauthorized workers, Congress addressed its discrimination concerns by including anti-discrimination provisions in the legislation. Later, when Congress established E-Verify, it made the program temporary and voluntary. In light of evidence that E-Verify continues to result in discrimination, Congress has kept E-Verify temporary and voluntary. If the Arizona statute and other state laws that make E-Verify permanent and mandatory are allowed to stand, they will result in the very discrimination Congress sought to eliminate. These state laws would undermine Congress' intent to prevent such discrimination. They are therefore preempted by federal law.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that review should be granted.

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