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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1324a(h)(2)—which "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens"—expressly preempts the provisions of the Legal Arizona Workers Act (Arizona statute), Ariz. Rev. Stat. Ann. § 23-211 *et seq.*, that sanction employers for knowingly or intentionally employing unauthorized aliens.

2. Whether a state or local government may require employers to enroll and participate in the federally created and administered E-Verify program.

3. Whether the Arizona statute is impliedly preempted because it undermines what *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002), describes as a "comprehensive scheme" to regulate the employment of unauthorized aliens.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

This case involves a preemption challenge to the Legal Arizona Workers Act (Arizona statute), Ariz. Rev. Stat. Ann. §§ 23-211 *et seq*.

1. a. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, prohibits hiring for employment "an alien knowing the alien is an unauthorized alien," as well as hiring any "individual without complying with the requirements of [8 U.S.C. 1324a(b)]." 8 U.S.C. 1324a(a)(1). Subsection (b) estab-

lishes the paper-based "I-9 system," which requires an employer to examine specified documents to verify that a person is authorized to work in the United States. 8 U.S.C. 1324a(b).

IRCA establishes a federal administrative scheme for determining whether an employer has complied with these requirements, as well as an escalating series of civil (and, ultimately, criminal) penalties depending on the nature of a violation. 8 U.S.C. 1324a(e). In contrast, "[a] person or entity that * * * has complied in good faith with the requirements of subsection (b)" has "an affirmative defense" to claims of having knowingly employed an unauthorized alien. 8 U.S.C. 1324a(a)(3). IRCA also expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324a(h)(2).

b. In 1996, Congress directed the Attorney General (who was then responsible for immigration enforcement) to "conduct 3 pilot programs of employment eligibility confirmation." Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 401, 110 Stat. 3009-655. Two of those pilot programs no longer exist; the third (originally called the Basic Pilot Program) has evolved into what is now called E-Verify. E-Verify "is an internet-based system that allows an employer to verify an employee's work-authorization status" and functions as "an alternative to the I-9 system." Pet. App. 10a.

In IIRIRA, Congress required that each federal department participate in one of the three pilot programs. § 402(e)(1)(A)(i), 110 Stat. 3009-658. Employers that violate IRCA also may be required to participate.

§ 402(e)(1)(A)(ii), 110 Stat. 3009-658. Subject to those exceptions, however, Congress provided that "the Attorney General may not require any person or * * * entity to participate in a pilot program." § 402(a), 110 Stat. 3009-656. Instead, IIRIRA states that an employer "may elect to participate in [a] pilot program," and describes such participation as "voluntary." *Ibid.*

As originally created, the E-Verify program was to last four years and to be available in at least "5 of the 7 States with the highest estimated population of aliens who are not lawfully present in the United States." § 401(b) and (c), 110 Stat. 3009-655, 3009-656. Since 1996, Congress has on four occasions extended the program's term and scope.[1] In 2003, Congress replaced previous references to the Attorney General with references to the Secretary of Homeland Security (Secretary), and directed the Secretary to make E-Verify available in all 50 States. 2003 Act, § 3(a) and (d), 117 Stat. 1944, 1945.

Under current law, the E-Verify program is authorized through September 30, 2012, at which point it will terminate absent further action by Congress. 2010 Act, § 547, 123 Stat. 2177.

2. The Arizona statute makes it a violation of state law for an employer to "knowingly" or "intentionally" employ "an unauthorized alien," and provides for enforcement of that prohibition in state court actions brought by county attorneys. Ariz. Rev. Stat. Ann.

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[1] Basic Pilot Extension Act of 2001, Pub. L. No. 107-128, § 2, 115 Stat. 2407; Basic Pilot Program Extension and Expansion Act of 2003 (2003 Act), Pub. L. No. 108-156, 117 Stat. 1944; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, Div. A, §143, 122 Stat. 3580; Department of Homeland Security Appropriations Act (2010 Act), Pub. L. No. 111-83, § 547, 123 Stat. 2177.

§§ 23-212(A) and (D), 23-212.01(A) and (D) (2009). The Arizona statute also requires that all employers "verify the employment eligibility of the employee through the [federal] e-verify program." *Id.* § 23-214(A).

a. The Arizona statute defines "unauthorized alien" by reference to federal law. Ariz. Rev. Stat. Ann. § 23-211(11) (2009) (incorporating 8 U.S.C. 1324a(h)(3)). In determining whether a particular alien meets that definition, the Arizona statute first provides that a state court "shall consider only the federal government's determination pursuant to 8 [U.S.C.] 1373(c)," *id.* §§ 23-212(H), 23-212.01(H), which requires federal officials to respond to inquiries about "the citizenship or immigration status of any individual." 8 U.S.C. 1373(c). In its next sentence, however, the Arizona statute states that "[t]he federal government's determination" pursuant to Section 1373(c) creates only "a rebuttable presumption of the employee's lawful status." Ariz. Rev. Stat. Ann. §§ 23-212(H), 23-212.01(H) (2009).

The Arizona statute does not require a prior federal determination with respect to whether an employer acted knowingly or intentionally in employing an unauthorized alien. Instead, the statute provides for the state court to make its own determination, subject to two evidentiary rules that reference federal law. First, an employer's demonstration that it verified the employee's work authorization through the federal E-Verify program "creates a rebuttable presumption" that the employer did not violate the Arizona statute. Ariz. Rev. Stat. Ann. §§ 23-212(I), 23-212.01(I) (2009). Second, as under IRCA, an employer "establishes an affirmative defense" to liability under the Arizona statute if it shows "that it has complied in good faith with the require-

ments of 8 [U.S.C.] 1324a(b)." *Id.* §§ 23-212(J), 23-212.01(J).

b. The consequences of violating the Arizona statute vary depending on whether the violation was knowing or intentional and whether it was a first or second violation. For a first "knowing" violation, the state court "[m]ay" order all relevant state agencies to suspend for up to ten business days "all licenses" held by the employer that are "specific to the business location where the unauthorized alien performed work," or, if the employer has no such licenses, "all licenses that are held by the employer at the employer's primary place of business." Ariz. Rev. Stat. Ann. § 23-212(F)(1)(c) and (d) (2009). For a first intentional violation, the court "shall" order such a suspension "for a minimum of ten days." *Id.* § 23-212.01(F)(1)(c).

A violation of the Arizona statute constitutes a "second violation" if it occurs within the three- or five-year probationary period that results from the finding of a first violation. Ariz. Rev. Stat. §§ 23-212(F)(3)(b), 23-212.1(F)(3)(b) (2009). During that probationary period, an employer must file quarterly reports with respect to every new hire at the business location where the employer previously employed an unauthorized alien. *Id.* §§ 23-212(F)(1)(b), 23-212.1(F)(1)(b). If a state court finds that an employer has committed a second violation (whether knowing or intentional), the court "shall order the appropriate agencies to permanently revoke all licenses that are held by the employer specific to the business location where the unauthorized alien performed work," or, if the employer has no such licenses, "all licenses that are held by the employer at the employer's primary place of business." *Id.* §§ 23-212(F)(2), 212.01(F)(2).

The Arizona statute defines "[l]icense" as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state." Ariz. Rev. Stat. Ann. § 23-211(9)(a) (2009). The Arizona statute further provides that "[l]icense" includes articles of incorporation and certificates of partnership but excludes "[a]ny professional license." *Id.* § 23-211(9)(b)(i)-(ii) and (c).

c. The Arizona statute provides no direct mechanism for enforcing its requirement that all employers use E-Verify. As noted previously, however, the Arizona statute provides that an employer that does so gains a rebuttable presumption that it did not knowingly or intentionally employ an unauthorized alien. In addition, failure to use E-Verify renders an employer ineligible for "any grant, loan or performance-based incentive from any government entity." Ariz. Rev. Stat. Ann. § 23-214(B) and (B)(1) (2009).

3. After a bench trial on stipulated facts, the district court concluded that the Arizona statute is not preempted. Pet. App. 49a-94a.

4. The court of appeals affirmed. Pet. App. 1a-25a.

a. The court first concluded that Section 1324a(h)(2) does not expressly preempt the Arizona statute's employer-sanctions provisions because those provisions fall within the savings clause permitting States to "impos[e] civil or criminal sanctions" so long as they do so "through licensing and similar laws." 8 U.S.C. 1324a(h)(2); see Pet. App. 14a-19a. Relying on *De Canas* v. *Bica*, 424 U.S. 351 (1976), the court of appeals applied a presumption against preemption "because the power to regulate the employment of unauthorized aliens remains within the states' historic police

powers." Pet. App. 16a. The court also determined that the Arizona "statute's broad definition of 'license' is in line with the terms traditionally used" to describe a license and that IRCA's legislative history did not warrant a different result. *Id.* at 17a-18a.

b. The court of appeals rejected petitioners' contention "that the Arizona provision mandating the use of E-Verify is impliedly preempted because it conflicts with Congressional intent to keep the use voluntary." Pet. App. 19a. The court observed that "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation," and it concluded that Congress's decision to make "participation * * * voluntary at the national level" did not "in and of itself indicate that Congress intended to prevent states from making participation mandatory." *Id.* at 20a. The court also noted that Congress "strongly encouraged" use of E-Verify "by expanding its duration and its availability," which showed that "Congress plainly envisioned and endorsed an increase in its usage." *Id.* at 21a.

c. The court of appeals rejected petitioners' assertion that the Arizona statute's "potential sanctions of suspension or revocation of an employer's business license impliedly conflict with IRCA." Pet. App. 21a. Petitioners argued that such "harsh sanctions," even if expressly saved from preemption by IRCA's savings clause, would "have the effect of encouraging employers to discriminate, and that such an effect would conflict with IRCA's purposes" of balancing effective enforcement of immigration laws with protection for civil rights. *Ibid.* The court of appeals determined, however, that petitioners' argument was "essentially speculative," because no complaints had "yet been filed under the" Arizona statute and the court had before it "no record

reflecting the [Arizona statute's] effect on employers." *Id.* at 21a-22a.[2]

DISCUSSION

The issues presented by the petition for a writ of certiorari are important and recurring. Throughout the country, States and localities have enacted—and are continuing to consider and enact—statutes and ordinances regulating the employment of unauthorized workers. See National Conference of State Legislatures, *2009 State Laws Related to Immigrants and Immigration, January 1 - December 31, 2009*, http://www.ncsl.org/default.aspx?tabid=19232 (last visited Mar. 26, 2010).[3] In particular, several States have enacted statutes that, like the Arizona statute at issue here, use suspension or revocation of licenses as a mechanism to penalize employers for hiring unauthorized workers. And several States have also, like Arizona, mandated use of E-Verify by some or all employers. App., 1a-3a, *infra*. To be sure, the enacted and proposed laws vary in their particulars, and there currently is no direct conflict in the circuits.[4] But these laws raise significant legal is-

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[2] The court of appeals also rejected petitioners' assertion that the Arizona statute violates the Due Process Clause by "depriv[ing] employers of * * * an adequate opportunity to dispute whether an employee was authorized to work." Pet. App. 23a-24a. Petitioners do not renew that claim.

[3] Arizona has recently enacted new legislation that, among other things, imposes sanctions on aliens who apply for, solicit, or perform work without authorization to do so. Ariz. Rev. Stat. § 13-2928 (enacted Apr. 23, 2010). That legislation is not at issue in this case.

[4] Although the Tenth Circuit's recent decision in *Chamber of Commerce* v. *Edmondson*, 594 F.3d 742 (2010), stated that it was "unpersuaded by" the Ninth Circuit's reasoning in this case in certain respects, *id.* at 770, there is no direct conflict between the two decisions.

sues, already have generated confusion among both employers and employees, and will continue to do so absent guidance from either Congress or this Court.

These considerations warrant a grant of certiorari with respect to the first question presented, which involves the employer-sanctions provisions of the Arizona statute. Those provisions disrupt a careful balance that Congress struck nearly 25 years ago between two interests of the highest importance: ensuring that employers do not undermine enforcement of immigration laws by hiring unauthorized workers, while also ensuring that employers not discriminate against racial and ethnic minorities legally in the country. Accordingly, the first question presented involves "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

In contrast, certiorari is unnecessary and unwarranted with respect to the E-Verify question. As of now, Congress has not chosen to require use of E-Verify by all employers, and the better reading of the law is that States and localities may not impose such requirements. But E-Verify is continuing to evolve, discussions are

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Edmondson involved a preemption challenge to an Oklahoma law that, among other things, (1) declares it a "discriminatory practice" to fire an employee who is legally authorized to work in the United States while retaining an employee that the employer knows or should know is not so authorized and (2) mandates use of E-Verify by certain employers. Oklahoma, however, specifically "waived any argument that its Act [was] a licensing or other similar law." *Ibid.* In addition, *Edmondson* did not reach any conclusion about the validity of Oklahoma's E-Verify requirement because one judge concluded that the plaintiffs lacked standing, *id.* at 772-774 (Hartz, J., concurring and dissenting), and the other two judges reached differing conclusions on the merits. Compare *id.* at 768-769 (opinion of Lucero, J.), with *id.* at 771-772 (Kelly, J., concurring in part).

ongoing within the federal government about appropriate ways to modify the system, and the sunset provision ensures that Congress will revisit the program and decide by September 30, 2012, whether to maintain it in its current form or modify the program. Thus, any decision on the E-Verify question could soon be overtaken by events, and there is no compelling need for the Court to intervene in this interim period. The Court should likewise deny certiorari with respect to the third question presented, which relies on a decision of this Court that did not involve preemption and has no bearing on the validity of the Arizona statute.

A. The Employer-Sanctions Question Warrants This Court's Review

IRCA expressly preempts "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). Respondents concede (Br. in Opp. 12) that the Arizona statute "impos[es] * * * sanctions." The Ninth Circuit determined, however, that the Arizona statute is saved from preemption because it falls within the savings clause. Pet. App. 14a-19a. That conclusion is incorrect.

1. The Arizona statute is not at bottom a "licensing [or] similar law[]"; it is instead a statute that prohibits the hiring of unauthorized aliens and uses suspension and revocation of all state-issued licenses as its ultimate sanction. Cf. S.C. Code Ann. §§ 41-8-20(A), 41-8-50(D)(2)-(4) (2009) (providing that "[a]ll private employers * * * shall be imputed a South Carolina employment license," which may be suspended or revoked if the employer knowingly or intentionally employs an unau-

thorized alien). The Arizona statute establishes neither a process nor any general standards for assessing an applicant's character or fitness to engage in a particular type of activity. Cf. *Cleveland* v. *United States*, 531 U.S. 12, 21 (2000) (describing previous cases involving "licensing schemes" governing the transport and sale of alcohol, the sale of stock, and the operation of ferries). It identifies only one basis for suspending or revoking an employer's licenses—*i.e.*, the knowing or intentional employment of an unauthorized alien. And the decision whether to suspend or revoke is made on an across-the-board basis by a state judge rather than on a license-by-license basis by the authorities who issued them.

2. The Ninth Circuit's decision also violates the maxim that exceptions should not be permitted to "swallow the rule." *Cuomo* v. *Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2718 (2009); see *Knight* v. *Commissioner*, 552 U.S. 181, 191 (2008) (when "Congress has enacted a general rule," courts "should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception") (citation omitted).

The general rule is that States may not "impos[e] civil or criminal sanctions * * * upon those who employ * * * unauthorized aliens." 8 U.S.C. 1324a(h)(2). This provision would prevent a State from imposing the smallest of fines on an employer as punishment for knowingly or intentionally hiring an unauthorized alien. Yet the Ninth Circuit's decision holds that a State may take the far greater step of terminating an employer's entire business so long as the State labels the sanction an act of licensing.[5] The meaning of "through licensing

[5] To be sure, the Arizona statute applies only to an employer "that has a license issued by an agency in this state." Ariz. Rev. Stat. Ann.

and similar laws" in Section 1324a(h)(2) is a matter of federal, not state, law. See *Drye* v. *United States*, 528 U.S. 49, 58 (1999) (stating that "[t]he question whether a state-law right constitutes 'property' or 'rights to property'" for purposes of federal tax lien legislation "is a matter of federal law") (internal quotation marks and citation omitted). And there is no reason to believe that Congress intended a result that would subvert the purpose and operation of its general prohibition on state sanctions.

3. Courts should "decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *United States* v. *Locke*, 529 U.S. 89, 106 (2000). The Ninth Circuit's broad reading of Section 1324a(h)(2)'s savings clause violates that principle.

The federal enforcement scheme created by IRCA reflects a delicate balance. When considering IRCA in 1986, Congress was well aware "of the widespread fear that" the employer-sanctions provisions "could result in

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§ 23-211(4) (2009). But the Arizona statute defines "license" very broadly, and the definition expressly includes articles of incorporation and documents necessary to create various forms of partnerships. *Id.* § 23-211(9)(b)(i)-(iv). Indeed, the definition of "license" is so broad that it would appear to include registration with the state agencies responsible for administering the state unemployment tax program—an act that is required of sole proprietorships as well. See Arizona Dep't of Econ. Sec., *Who Pays Unemployment Taxes?*, https://www.azdes.gov/main.aspx?menu=316&id=3962 (last visited Apr. 26, 2010); Arizona Dep't of Econ. Sec., *Arizona Joint Tax Application*, https://www.azdes.gov/main.aspx?menu=316&id=3960 (last visited Apr. 26, 2010); see also Ariz. Rev. Stat. Ann. § 23-211(9)(a) (2009) (defining "license" to include "any * * * registration * * * that is required by law and that is issued by any agency for the purpose of operating a business in this state").

employment discrimination against Hispanics and other minority groups." H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, 49 (1986) (*1986 House Report*). In response, Congress took a number of steps that address "the potential for [an] unfortunate cause and effect relationship between sanctions enforcement and resulting employment discrimination." *1986 House Report* Pt. 2, at 12.

First, Congress provided various procedural protections and limits on liability for employers accused of violating Section 1324a by employing unauthorized aliens. Hearings are held before administrative law judges, 8 U.S.C. 1324a(e)(3)(B), and an employer may obtain federal judicial review of any adverse decision that involves a financial assessment, 8 U.S.C. 1324a(e)(8). Subject to exceptions for repeat offenders, an employer "is considered to have complied with [each applicable requirement contained in Section 1324a(b)] notwithstanding a technical or procedural failure to meet such requirement," so long as the employer made "a good faith attempt to comply." 8 U.S.C. 1324a(b)(6)(A). And outside pattern-or-practice cases, see 8 U.S.C. 1324a(f)(1), sanctions under federal law are limited to no more than $2000 per unauthorized worker in the case of a first violation and no more than $5000 per unauthorized worker in the case of a second violation. 8 U.S.C. 1324a(e)(4).

Second, Congress concluded that "sanctions enforcement and liability" for employers who hire unauthorized aliens "must be" balanced by "an equally strong and readily available remedy if resulting employment discrimination occurs." *1986 House Report* Pt. 2, at 12. Congress thus enacted a new provision, Section 1324b, which makes it "an unfair immigration-related employment practice" to discriminate based on citizenship or immigration status or based on national origin, 8 U.S.C.

1324b(a)(1), and establishes an administrative regime essentially parallel to the one under Section 1324a to enforce that prohibition. In particular, the schedule of monetary fines authorized under Section 1324b is the same as that under Section 1324a. Compare 8 U.S.C. 1324a(e)(4)(A)(i)-(iii), with 8 U.S.C. 1324b(g)(2)(B)(iv)(I)-(III).[6]

The Arizona statute disrupts the careful balance struck by Congress in IRCA. Proceedings occur before local judges, with no possibility of federal district court review, and those state adjudicators need not await or defer to a federal determination about whether an employer has knowingly or intentionally employed an unauthorized alien. The remedies authorized under the Arizona statute for hiring an unauthorized alien—suspension of an employer's licenses for a first violation and permanent revocation for a second, see p. 5, *supra*—are far more severe than those authorized under federal law. And unlike IRCA, the Arizona statute contains no parallel anti-discrimination provision

4. The court of appeals erred in relying (Pet. App. 15a) on this Court's pre-IRCA decision in *De Canas* v. *Bica*, 424 U.S. 351 (1976). In *De Canas*, the Court rejected a preemption challenge to a California law barring employers from knowingly employing an unautho-

[6] There are certain differences between the two sections. For example, criminal penalties are available for certain pattern-or-practice violations of Section 1324a (8 U.S.C. 1324a(f)(1)), but are unavailable under Section 1324b; and the imposition of monetary sanctions is mandatory under Section 1324a (8 U.S.C. 1324a(e)(4)(A)), but discretionary under Section 1324b (8 U.S.C. 1324b(g)(2)(B)(iv)). In contrast, only Section 1324b authorizes remedies designed to address the particular harms suffered by victims of discrimination, including backpay and removal of adverse performance reviews or warnings from an employee's personnel file. 8 U.S.C. 1324b(g)(2)(B)(iii) and (vii).

rized alien when doing so would have an adverse effect on lawful resident workers. *Id.* at 352. In reaching that conclusion, *De Canas* stated that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State," and described the challenged law as "within the mainstream of" a State's police powers. *Id.* at 356.

But *De Canas* did not involve the express preemption provision that is at issue in this case. To the contrary, when *De Canas* was decided, federal law did not generally regulate the employment of unauthorized aliens, and the Court saw "Congress' failure to enact" such a law as evidence that "Congress believes this problem * * * is appropriately addressed by the States as a local matter." 424 U.S. at 360 n.9.

IRCA is what was missing when the Court decided *De Canas*—a "general law[]" that makes it unlawful for employers to hire unauthorized aliens. 424 U.S. at 360 n.9. And unlike the more limited federal laws in place at the time of *De Canas*, IRCA contains a "specific indication" (Section 1324a(h)(2)) "that Congress intended to preclude even harmonious state regulation." *Id.* at 358. Because it can no longer be said that federal law has only "a peripheral concern with employment of illegal entrants," *id.* at 360, *De Canas* provides no support for applying a presumption against preemption in this case.

B. The E-Verify Question Does Not Warrant This Court's Review

1. There is substantial reason to doubt whether the Ninth Circuit was correct in holding that, under current law, States may mandate participation in the federal E-Verify program. As noted previously, the program that has evolved into E-Verify began as one of three pilot

programs created in 1996 to study ways to improve the process of verifying employment eligibility. As originally conceived, those programs were meant to be limited in scope and temporary in duration. See p. 3, *supra*.

Consistent with the aim of studying the use of cooperative agreements with employers to verify employment eligibility, the statutory text indicates that Congress intended participation in E-Verify to be achieved through individual election rather than a blanket mandate on all employers. Subject to two express exceptions—federal departments and employers previously found to have violated IRCA, see pp. 2-3, *supra*—Congress provided that an employer that conducts hiring in a State in which a pilot program is operating "may elect to participate in that pilot program." IIRIRA § 402(a), 110 Stat. 3009-656. Other provisions of the same statute and the accompanying section headings refer to an employer's "elect[ion]" to participate in a pilot program,[7] as well as "the voluntary nature of" the programs.[8] These provisions suggest that Congress intended, as a general matter, to permit employers to choose whether to participate in E-Verify.

The structure of the statute and the language of voluntariness would appear to bar Arizona's mandate. To be sure, the statutory text does not "expressly forbid state laws from requiring E-Verify participation," Pet. App. 20a, and the Secretary of Homeland Security is the only government official whom Congress has specifically barred from "requir[ing] any person or other entity to

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[7] §§ 402(b)(2), (c)(1), (2)(A) and (i)-(ii), (2)(B) and (B)(i), (3)(A) and (B), (4), 403(a)(1) 110 Stat. 3009-657 to 3009-659.

[8] § 402(d)(2) and (3)(A), 110 Stat. 3009-658.

participate in a pilot program." IIRIRA § 402(a), 110 Stat. 3009-656. But the statutory language contains no indication that Congress intended to permit States to undermine its own decision not to impose a blanket mandate on all employers by allowing States to impose just such a mandate.

Congress's determination that E-Verify be administered by federal employees using federal resources further suggests that state and local governments may not require employers to participate. In the particular circumstances of this case, a state mandate will not deplete limited federal resources: the Department of Homeland Security (DHS) advises that the E-Verify system can accommodate the increased use that the Arizona statute and other existing similar laws would create. But in a wide variety of other contexts, participation requirements imposed by state or local governments may overload otherwise elective federal programs by increasing the number of participants beyond what Congress anticipated. Federal statutes of this kind should not ordinarily be understood to give States the ability to impose such burdens on federal programs.

The nature of what an employer must agree to in order to participate in E-Verify casts further doubt on the Ninth Circuit's conclusion that States and localities may mandate participation in the absence of federal authorization to do so. To comply with the Arizona statute's requirement to use E-Verify, an employer would need to enter into a Memorandum of Understanding (MOU) with both DHS and the Social Security Adminis-

tration (SSA)[9] and follow additional federal statutory requirements that are applicable only to users of E-Verify, see IIRIRA § 403(a), 110 Stat. 3009-659.

This Court has stated that "the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). A State's action to require an employer to enter into a contractual arrangement with the federal government when the formation of such an arrangement otherwise would have been the voluntary choice of the employer threatens to change the character of that relationship and thus upset the "delicate balance of statutory objectives" sought by Congress. *Id.* at 348. Absent congressional authorization nowhere present in this statute, a State may not restructure in this fundamental way the regulatory relationships and functions of a federal agency.[10]

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[9] The MOU is available at http://www.uscis.gov/files/nativedocuments/MOU.pdf.

[10] On June 6, 2008, President George W. Bush issued an Executive Order requiring all executive departments and agencies that enter into contracts to "require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary [of Homeland Security] to verify the employment eligibility of" certain employees. Exec. Order No. 13,465, 73 Fed. Reg. 33,286. After then-Secretary Michael Chertoff designated "the E-Verify system, modified as necessary and appropriate," as the relevant system, *id.* at 33,837 (2008), the Administrator of the General Services Administration and the Administrator of the National Aeronautics and Space Administration promulgated a final rule requiring certain federal contractors and subcontractors to use E-Verify for certain employees. *Id.* at 67,651. Both the Executive Order and the rule were challenged, and the district court granted summary judgment

to the government defendants. *Chamber of Commerce* v. *Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009). The plaintiffs voluntarily dismissed their appeal on December 14, 2009. No. 09-2006 Docket entry Nos. 21-22 (4th Cir.).

The government's position in the federal contractor litigation is consistent with its position here. The Executive Order and the corresponding regulations were issued pursuant to the President's broad authority to "prescribe policies and directives that the President considers necessary to carry out" the provisions of the Federal Property and Administrative Services Act of 1949 (Procurement Act), Ch. 288, 40 U.S.C. 121, so long as those directives are "consistent" with the Procurement Act itself, 40 U.S.C. 121(a); and, unlike the Arizona law at issue here, the Executive Order raises no issues concerning the relationship between the federal and state governments. Moreover, as the government noted in the federal contractor litigation, the choice to become a federal contractor is entirely voluntary and never compelled. And in light of Congress's mandate that all federal departments participate in a pilot program to verify employment eligibility, IIRIRA § 402(e)(1)(A)(i), 110 Stat. 3009-658, there is an obvious symmetry in requiring that those who wish to enter into a cooperative relationship with one of those departments do so as well.

One of the plaintiffs' arguments in the federal contractor litigation was that the final rule violated the provision of IIRIRA stating that the Secretary "may not require any person or other entity to participate in a pilot program." § 402(a), 110 Stat. 3009-656. As part of its response, the government argued that Section 402(a) was inapplicable because the Secretary did not issue the final rule. In connection with that argument, one of the government's briefs stated: "[A]s plaintiffs' *amici* point out, the State of Arizona has required all public and private employers in that State to use E-Verify to verify the employment status of their workers. This is permissible because the State of Arizona is not the Secretary of Homeland Security." Defs' Reply Mem. in Supp. of their Mot. for Summ. J. at 7, *Chamber of Commerce, supra* (citations omitted); see Opp'n to Pls.' Emergency Mot. for an Injun. Pending Appeal at 7, *Chamber of Commerce* v. *Napolitano*, No. 09-2006 (4th Cir. filed Sept. 6, 2009) (similar). This statement, however, did not reflect a blanket pronouncement on the validity of the Arizona statute from all constitutional and statutory challenges. Obviously, no such challenges (nor the Arizona statute itself) were at issue in the federal-contractor

2. Nonetheless, this Court's review is not now warranted on the E-Verify question. As an initial matter, the Arizona statute contains no direct mechanism for enforcing its requirement that all employers use E-Verify. In the absence of such a mechanism, it is as yet unclear how Arizona's requirement of E-Verify participation will be implemented, at least with respect to employers who do not receive "grant[s], loan[s] or performance-based incentive[s] from" state or local entities. Ariz. Rev. Stat. Ann. § 23-214(B) and (B)(1) (2009).

Still more important, the requirement of E-Verify participation is itself a moving target. The first question presented, concerning employer sanctions, involves whether the Arizona statute and others like it, App., *infra*, 1a-2a, are consistent with the express terms of a comprehensive federal statutory regime (IRCA) that has been in place for nearly 25 years. In contrast, the second question presented, concerning E-Verify, involves the relationship between the Arizona statute and a still-evolving federal program whose nature and scope have changed in numerous respects since its creation and which may change again in the near future. See p. 3, *supra*.

In what form E-Verify should exist; whether Congress should mandate participation by some or all employers; and whether States and localities should be able to require participation and, if so, in what circumstances all raise "important federal question[s]." Sup. Ct. R. 10(c). In contrast to the questions raised by the employer-sanctions provisions, these difficult and evolving issues regarding E-Verify should be resolved, at

litigation. Instead, the statement in that brief was limited to explaining the scope of the express prohibition contained in Section 402(a), which is by its terms limited to the Secretary.

least in the first instance, by the political branches, rather than this Court. The Arizona statute is not currently creating a strain on federal resources, see p. 17, *supra*, so there is no pressing need for this Court's intervention. Electronic verification of work authorization is expected to receive close attention in any immigration reform legislation, and the sunset provision will in any case require Congress to consider before September 30, 2012, whether to maintain E-Verify as it currently exists or instead modify the program. See p. 3, *supra*. In these circumstances, the Court should deny certiorari as to the second question presented.

C. The Third Question Presented Does Not Warrant This Court's Review

Petitioners also argue that the Arizona statute is impliedly preempted because it undermines what this Court's decision in *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002) (*Hoffman*), describes as IRCA's "comprehensive scheme prohibiting the employment of illegal aliens in the United States." That claim does not warrant further review.

Hoffman is irrelevant to the issues here. That case "did not involve preemption, or indeed any state regulation." Pet. App. 16a. Instead, *Hoffman* involved whether a federal entity (the National Labor Relations Board (Board)) could award a particular remedy (backpay) to an unauthorized alien for violations of a federal statute (the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*). See *Hoffman*, 535 U.S. at 140. No federal statute addressed the relationship between the NLRA and IRCA. Instead, the Court relied on a principle, derived from previous decisions, that "the Board's chosen remedy * * * may be required to yield" if it "trenches

upon a federal statute or policy outside the Board's competence to administer." *Id.* at 147.

Here, in contrast, Congress has (in Section 1324a(h)(2)) directly addressed the relationship between IRCA and state laws regulating employment of unauthorized aliens. Because that section expressly preempts the Arizona statute at issue, see pp. 10-15, *supra*, the Court need not consider any questions of implied preemption. And even if the Court were to do so, the implied preemption inquiry would involve "[f]ederalism concerns [that] were not at issue and, therefore, were not addressed in *Hoffman*." *Madeira* v. *Affordable Hous. Found., Inc.*, 469 F.3d 219, 237 (2d Cir. 2006). The Court therefore should deny certiorari with respect to the third question presented.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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APPENDIX

Statutes and ordinances providing for suspension of licenses based on hiring of undocumented aliens

Miss. Code Ann. § 71-11-3(4)(a) (2009) (stating that employers may "only hire employees who are legal citizens of the United States of American or are legal aliens"); *id.* § 71-11-3(7)(e) (2009) (providing for "the loss of any license, permit, certificate or other document granted to the employer by any agency, department or government entity in the State of Mississippi for the right to do business in Mississippi for up to one (1) year, or both" for a violation of Section 71-11-3(4)(a)).

Mo. Rev. Stat. § 285.530(1) (2010) ("No business entity or employer shall knowingly employ * * * an unauthorized alien"); *id.* § 285.535(8) (2010) (providing for a one-year suspension of "the business permit * * * and any applicable license or exemptions of [any] business entity" that commits a second violation of Section 285.530(1)).

S.C. Code Ann. § 41-8-30 (2009) ("A private employer shall not knowingly or intentionally employ an authorized alien); *id.* § 41-8-50(D)(2)-(4) (providing for a suspension of an employer's "license" for between ten and 30 days for a first violation, a suspension of between 30 and 60 days for a second violation, and revocation of license for a third violation); *id.* § 41-8-20(A) (stating that "[a]ll private employers in South Carolina on or after July 1, 2009, shall be imputed a South Carolina employment license" and "may not employ a person unless his South Carolina employment license is in effect and is not suspended or revoked").

Tenn. Code Ann. § 50-1-103(b) (2008) (barring any person from "knowingly employ[ing] * * * an illegal alien"); *id.* § 50-1-103(e)(1)(B) (providing for a one-year suspension of an employer's "license" upon a second violation); *id.* § 50-1-103(a)(8) (defining "[l]icense" as "any certificate, approval, registration or similar form of permission required by law").

Va. Code Ann. § 13.1-753(A)(iv) (2009) ("The corporate existence of a corporation may be terminated involuntarily by order of the [appropriate state agency] when it finds that the corporation * * * (iv) has been convicted for a violation of 8 U.S.C. § 1324a(f), as amended, for actions of its officers and directors constituting a pattern or practice of employing unauthorized aliens in the Commonwealth.").

W. Va. Code Ann. § 21-1B-3(a) (2008) ("It is unlawful for any employer to knowingly employ, hire, recruit or refer, either for him or herself or on behalf of another, for private or public employment within the state, an unauthorized worker who is not duly authorized to be employed by law."); *id.* § 21-1B-7(a)(1) and (2) (providing for suspension or revocation of "any license held by the employer" upon a third violation of Section 21-1B-3(a)); *id.* § 21-1B-2(f) (defining "[l]icense" as "any permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued for the purpose of operating a business in this state").

States requiring participation in E-Verify

Miss. Code Ann. § 71-11-3(b)(i) (West 2009) (requiring all employers to use E-Verify).

S.C. Code Ann. § 41-8-20(B) (2009) (requiring that, as of July 1, 2009, all employers must either participate in E-Verify or employ only workers who (1) have a valid South Carolina license, (2) are eligible for a South Carolina license, (3) or possess a driver's license or identification card from a state with requirements at least as strict as South Carolina's).

Colo. Rev. Stat. § 8-17.5-102 (2009); Ga. Code Ann. § 13-10-91 (2009); Minn. Exec. Order No. 08-01; Mo. Rev. Stat. § 285.530 (2010); Neb. Rev. St. § 4-114 (2009); R.I. Exec. Order No. 08-01 (all requiring employers with state government contracts to use E-Verify);

Utah Code Ann. § 63G-11-103(c)(ii) (2008) (requiring contractors to use an electronic verification program to verify new hires but permitting contractors to choose from more than one verification program, including E-Verify and the Social Security Number Verification Service ("SSNVS")).

Okla. Stat. Tit. 25, § 1313(A) and (B) (West 2010) (requiring that all public employers, those who contract with public employers, and those who contract with those who contract with public employers to use a state-designated Status Verification System); *id.* § 1312 (defining "Status Verification System" to include E-Verify, any other program operated by DHS, an "independent, third-party system with an equal or higher degree of reliability," or the "Social Security Number Verification Service" operated by SSA).