No. 09-115

IN THE
Supreme Court of the United States

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

Petitioners,

v.

MICHAEL B. WHITING *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, A MEMBER OF THE ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE, *ET AL.*, IN SUPPORT OF PETITIONERS

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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
- Anti-Defamation League
- Asian American Institute
- Asian American Legal Defense and Education Fund
- Asian Law Caucus
- Asian Pacific American Legal Center of Southern California
- LatinoJustice PRLDEF
- Lawyers' Committee for Civil Rights Under Law
- League of United Latin American Citizens
- Legal Aid Society – Employment Law Center
- Los Abogados Hispanic Bar Association
- National Council of La Raza
- National Day Laborer Organizing Network
- National Employment Law Project
- 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. 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 because those laws interfere with federal laws specifically designed to prevent discrimination. *Amici* support the Petitioners and submit that the decision of the Court of Appeals for the Ninth Circuit should be reversed. This brief highlights Congress' long-standing and well-documented desire to prevent the discrimination resulting 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 within the Asian American Center for Advancing Justice—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.

The **Anti-Defamation League** ("ADL") was organized in 1913 to fight anti-Semitism and all forms of bigotry and to defend democratic ideals. As an organization with a long and proud tradition of defending civil liberties for all, ADL has in recent years taken a lead role in exposing the virulent anti-immigrant and xenophobic rhetoric that has risen to the surface as part of the national debate over immigration. ADL speaks out against discrimination and bigotry and advocates a meaningful policy that honors America's promise as a nation of immigrants.

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 is a member of the Asian American Center for Advancing Justice, whose other members include the Asian American Justice Center, Asian Law Caucus, and Asian Pacific American Legal Center. 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 American Legal Defense and Education Fund** ("AALDEF"), founded in 1974, is a national organization that protects and promotes the

civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF has a long history of fighting discrimination in employment. The Arizona legislation will result in discrimination against Asian Americans.

Founded in 1972, the **Asian Law Caucus** ("ALC") is the nation's oldest legal organization advancing the civil rights of Asian American and Pacific Islander communities. ALC is a member of the Asian American Center for Advancing Justice, whose other members include the Asian American Institute, Asian American Justice Center, and Asian Pacific American Legal Center. ALC has a long history of protecting low-wage immigrant workers and regularly engages in broad community education on pressing civil and employment rights issues. ALC is committed to ending discrimination and unfair treatment of vulnerable individuals including those who may be impacted by the mandatory implementation of the E-Verify program.

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. APALC is a member of the Asian American Center for Advancing Justice, whose other members include the Asian American Institute, Asian American Justice Center, and Asian Law Caucus. 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.

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 38-year history, LatinoJustice has litigated numerous cases on behalf of the Latino community against multiple forms of discrimination.

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.

The **Legal Aid Society – Employment Law Center** ("LAS-ELC") is a nonprofit legal services organization, founded in 1916, that litigates cases nationwide on behalf of low-wage workers, particularly those who belong to traditionally subordinated communities. Through its National Origin, Immigration, and Language Rights Program, LAS-ELC endeavors to protect the rights of individuals who face discrimination because they belong to a particular ethnic community, because they or their ancestors immigrated to the United States, or because of their linguistic or cultural characteristics. As part of this work, LAS-ELC has litigated numerous cases vindicating the ability of workers to protect their legal rights irrespective of their immigration status. LAS-

ELC has a strong interest in seeing the decision of the Ninth Circuit reversed, because allowing it to stand will subject countless workers to unlawful discrimination on the basis of their actual or perceived national origin or immigration status – discrimination that the Immigration Reform and Control Act of 1986 sought to prevent.

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.

The **National Employment Law Project** ("NELP") is a non-profit organization that has worked for 40 years to advance the workplace rights of low-wage workers, including immigrant workers. In partnership with community groups, unions, state and federal public agencies, NELP seeks to ensure that all employees, especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation's labor and employment laws. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of low-wage and immigrant workers under federal and state labor and employment laws.

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

For more than forty years, the United States has had a firm national commitment to prohibiting discrimination in employment on the basis of race or national origin. That commitment extends to prohibiting not only practices that are motivated by racially discriminatory or nativist concerns, but also practices that, whatever their motivation, have a disparate impact.

In enacting recent immigration laws, Congress struck a careful balance between this longstanding national nondiscrimination policy and the federal interest in eliminating the incentive for illegal immigration created when employers hire individuals who are not authorized to work in the United States. In particular, when Congress adopted comprehensive immigration reform in the Immigration Reform and Control Act of 1986, it included a strong nondiscrimination provision within the statute. Similarly, when Congress created an electronic employment verification system ("E-Verify") for employers in the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996, it made that system both voluntary and temporary to enable periodic reevaluation and to avoid entrenching discrimination that might occur.

Arizona's Legal Arizona Workers Act ("LAWA") upsets Congress' carefully crafted balance. Whatever its stated purpose, Arizona's law has the effect of fostering discrimination prohibited by federal law. To avoid LAWA's sanctions for employing unauthorized workers and reduce compliance costs, employers face a powerful incentive not 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 to work. Because LAWA undercuts federal policy, it is preempted.

ARGUMENT

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

1. For nearly a half century, the prohibition on discrimination in employment has represented a "fundamental public policy" of the United States. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 594 (1983). That policy is articulated in Title VII of the Civil

Rights Act of 1964, which forbids discrimination on the basis of "race" or "national origin." 42 U.S.C. § 2000e-2(a); *see also* 42 U.S.C § 1981 (forbidding discrimination on the basis of race in making or enforcing contracts, including employment contracts); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (treating discrimination on the basis of national origin as racial discrimination within the meaning of § 1981).

The federal prohibition on race- or national origin-based discrimination extends beyond practices that are motivated by animus against members of racial minorities or particular nationalities to reach practices that have a disparate impact on such individuals as well. *See Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) (interpreting Title VII to "proscrib[e] not only overt discrimination but also practices that are fair in form, but discriminatory in operation"); 42 U.S.C. § 2000e-2(a), (k).

Thus, in a variety of situations, this Court and lower federal courts have struck down employment practices that have a disparate impact on members of particular racial groups or persons of a particular national origin. *See, e.g., Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (pre-employment tests that had a discriminatory impact on African-American employees were not job-related); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982) (policy assigning better jobs with higher pay and more guaranteed hours to shareholder-employees, who were all of Italian ancestry, had adverse impact on African-American and Spanish-surnamed

employees); *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976) (high school diploma prerequisite had disparate impact on African-American employees and was not required by business necessity).

2. The history of federal employment verification requirements reflects Congress' consistent efforts to safeguard equal employment opportunity throughout its efforts to reduce illegal immigration by reducing the economic incentives for individuals to enter the United States, beginning with the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359.

Prior to IRCA, during the early 1980's, a number of official reports had addressed the potential for discrimination in employer verification systems. Most notably, a 1980 report to the President and Congress from the U.S. Commission on Civil Rights strongly opposed employer sanctions legislation because the likely consequences included discrimination and placement of employers in the role of immigration officers. U.S. Commission on Civil Rights, *The Tarnished Golden Door— Civil Rights Issues in Immigration* (Sept. 1980), at 74.

Against this backdrop, when Congress initially addressed the employment of unauthorized individuals in the Immigration Reform and Control Act of 1986, Congress specifically sought to reduce the danger of racial and national origin discrimination. 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 the ban on knowingly hiring unauthorized workers with a corresponding prohibition on discrimination on the basis of national origin or citizenship status (*id.* § 1324b(a)(1)). Congress carefully calibrated the incentives employers faced by imposing the same graduated scale of monetary penalties for violating section 1324a (ban on hiring unauthorized workers) as it did for violating section 1324b (ban on discrimination). *Compare id.* § 1324a(e)(4)(A) *with id.* § 1324b(g)(2)(B)(iv).

That calibration reflected Congress' express concern that immigration reform should not result in discrimination. The House Report accompanying IRCA pointed to the testimony of numerous witnesses who "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.").

In part responding to these concerns, IRCA contained reporting requirements directing the General Accounting Office ("GAO") to determine if existing 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. The GAO's final report found that the implementation of employer sanctions had resulted in a widespread pattern of discrimination against authorized workers and that many of these discriminatory practices had apparently resulted from IRCA. The 1990 GAO report further noted significant employer confusion in complying with verification provisions. U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and Questions of Discrimination* (Mar. 1990) (GGD-90-62), at 3-4, *available at* http://archive.gao.gov/d24t8/140974.pdf.

The Executive Branch also expressed a commitment to ensuring that any employer verification program operated in a manner consistent with fair employment laws. 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. 60 Fed. Reg. 7885 (Feb. 7, 1995).

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 considering concerns of discrimination, particularly in any pilot programs for new methods of 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. 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. Immigration Verification Subgroup of the Interagency Working Group on Immigration, *Employment Verification Pilots: Anti-Discrimination Concerns and Recommendations* (Sept. 26, 1995).

3. The E-Verify program thus must be understood in light of a consistent preexisting commitment to ensuring that immigration reform involving employment verification be accomplished without undermining federal fair employment law.

E-Verify has its origins in 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). The initial program for verifying individuals' eligibility for employment was known as the "Basic Pilot" because it was (and still is) a means for the Immigration and Naturalization Service ("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.[2] Initially, E-Verify was to run for four years; later legislation has reauthorized it on a *temporary* and *voluntary* basis.

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." Institute for Survey Research, Temple University, and Westat, *Findings of the Basic Pilot Program Evaluation* (June 2002), at 136. One of the four primary goals of the IIRIRA pilot programs, including E-Verify, was to "[r]educe discrimination." *Id.* at 28-29; *see* S. Rep. 104-249, at 59-60 (1996) (statement by Sens. Simon and Kennedy

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2. A federal regulation conditions eligibility for certain federal contracts on participation in E-Verify. Federal Acquisition Regulation, 73 Fed. Reg. 67,651 (Nov. 14, 2008); s*ee Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726, 736 (D. Md. 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.

recognizing need for safeguards against discrimination and supporting pilot programs as providing proper balance). 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 a perceived likelihood that additional verification will be required, beyond what is required for most job applicants." IIRIRA § 404(d)(4).

A 2002 report commissioned by the INS to fulfill a congressionally mandated reporting requirement with respect to E-Verify repeated the long-standing concern with the dangers of discrimination posed by wholesale, reflexive imposition of electronic employment verification. Entitled "Findings of the Basic Pilot Program Evaluation" (the "2002 Evaluation"),[3] the report describes the history of Congress' concern about discrimination and analyzes the relationship between E-Verify and discrimination. That report noted, among other things, that "[a]s 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.

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3. Institute for Survey Research, Temple University, and Westat, *Findings of the Basic Pilot Program Evaluation* (June 2002) (report submitted to the INS).

4. The subsequent history of E-Verify underscores Congress' commitment to ensuring that employment verification be done in a fashion that avoids unnecessary threats to fair employment. Thus, 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.[4] *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"); H. R. Rep. 108-304 pt. 1 at 22, 26-27, 43 (2003) (statements by Reps. Lee, Berman, and Conyers, et al., during debate on Basic Pilot Program Extension and Expansion Act of 2003, noting problems with E-Verify found by 2002 Evaluation). The 2002 Evaluation devotes an entire section to the impact of E-Verify on discrimination, determining that there was evidence that E-Verify caused discrimination. The 2002

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4. Congress had the 2002 Evaluation in hand when it passed legislation in 2003 to extend E-Verify through November 2008 and keep the program voluntary. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 (extending term of E-Verify and expanding availability to all fifty states, but keeping program voluntary and temporary to permit further study and evaluation).

Evaluation identifies numerous concerns regarding the links between E-Verify and discrimination.

Some of these difficulties were attributable to Government-created difficulties. For example, 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."[5] 2002 Evaluation at 121. "[I]naccuracies in the SSA and INS databases could result in some work-authorized persons being incorrectly identified as not work-authorized." *Id.* at 137. The E-Verify databases contained errors that resulted in false tentative nonconfirmations for disproportionate numbers of Hispanics and Asians.[6] *See id.* Thus, misidentification resulted in "unintentional discrimination against foreign-born employees." *Id.* 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.*

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5. 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* (Dec. 2006) (A-08-06-26100), at ii, *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf.

Other problems were due to employers' failures to follow the requirements of E-Verify. For example, there was "considerable evidence that Basic Pilot employers are using the system to prescreen applicants, although E-Verify prohibits prescreening." *Id.* at 143. This prescreening occurred because employers were reluctant to "bear the cost of training individuals who later turn out to be non-work-authorized." *Id.* at 138.

The 2002 Evaluation further 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." *Id.* 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

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6. 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.

discrimination against foreign-born individuals compared to native-born individuals in the time immediately following hire." *Id.* at 145.

Still other problems were caused by the incentives and disincentives created by E-Verify. Findings suggested "that some Basic Pilot employers are . . . disproportionately denying employment to those receiving tentative nonconfirmations." *Id.* at 140. Employees were further disadvantaged because employers often gave them no "opportunity to resolve the nonconfirmation." *Id.* 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 explained the dynamic: "[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." *Id.* at 137.

5. The risk of discrimination from E-Verify remains high. A 2007 study commissioned by the INS (now DHS) reinforces this conclusion. It noted the continued "limitations of Federal data for verification purposes, the potential for workplace discrimination and privacy violations, and practical logistical considerations about larger scale implementation." Westat, *Findings of the Web Basic Pilot Evaluation* (Sept. 2007) (report submitted to DHS) ("2007 Evaluation"), at 5;[7] *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 issues 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." *Id.* at xxvi.

Erroneous tentative nonconfirmation rates due to database deficiencies are a critical shortcoming of E-Verify that produce discrimination. The 2007 Evaluation 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." *Id.* at 96.

With respect to differences in tentative nonconfirmation rates, the 2007 Evaluation reported that the "erroneous tentative nonconfirmation rate for

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

employees who were eventually found to be work-authorized is approximately 30 times higher for foreign-born employees than for U.S.-born employees."[8] *Id.* at 97. 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 id.* 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."[9] Authorized workers who receive tentative nonconfirmations experience discrimination even after they are hired. These employees are denied work assignments, denied job benefits, and fired from their jobs.[10] As a result of receiving a tentative nonconfirmation, one employee was terminated two hours after being hired.[11] Another person received a job offer only to see it rescinded after receiving a tentative

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8. A December 2009 study commissioned by DHS found that the erroneous tentative nonconfirmation rate remains high for foreign-born employees: the erroneous tentative nonconfirmation rate in mid-2008 for foreign-born employees was twenty times higher than for U.S.-born employees. Westat, *Findings of the E-Verify Program Evaluation* (Dec. 2009) (report submitted to DHS) at 210; *available at* http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.

nonconfirmation, even though he later offered the employer confirmation from the SSA that he was authorized to work in the United States.[12] Some employees did not receive training while contesting tentative nonconfirmations, and some employees were paid less. 2007 Evaluation at 77.

6. Faced with this information, Congress extended E-Verify for only a temporary period and without making participation mandatory. Indeed, 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

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9. 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.

10. 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, Jan. 2009), at iii.

11. 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.

12. National Immigration Law Center, *How Errors in Basic Pilot/E-Verify Databases Impact U.S. Citizens and Lawfully Present Immigrants* (April 2008) *available at* http://www.nilc.org/dc_conf/flashdrive09/Worker-Rights/emp10_e-verify-impacts-USCs-2008-04-09.pdf

recently in 2009. *See* Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 547, 123 Stat. 2177.

Congress has thus approved a program that remains voluntary, temporary and subject to ongoing study and revision. Congress has sought to avoid the unlawful discrimination that would result from a mandatory, permanent employer verification program.

Arizona's program, embodied in the mandatory, permanent requirements of the Legal Arizona Workers Act (LAWA), abandons these safeguards and careful calibrations. By making E-Verify participation mandatory and permanent, LAWA thwarts Congress' carefully considered policy of balancing controls on illegal immigration with the need to prevent discrimination against U.S. citizens and other authorized workers. LAWA directly frustrates Congress' intent not to require participation in E-Verify until steps are taken to considerably reduce the error rate and its harmful effects.

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

Amici support Petitioners' position that state laws that override Congress' decisions to keep E-Verify a temporary program and to make participation in E-Verify voluntary are preempted. As set forth in the Brief for the Petitioners, 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* Brief for Petitioners at 4-8. Congress achieved this balance with deliberate precision that is reflected not only in its decisions to make E-Verify temporary and voluntary but also in how it calibrated penalties for hiring unauthorized workers and discriminating against authorized ones.

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 the enactment of IRCA.

The Arizona statute makes 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."[13]

Given the centrality of several aspects of the federal scheme that LAWA overrides, that statute must be preempted if Congress' dual goals are to be achieved.

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13. Daniel González, *Taunts, Threats as Employer-Sanctions Law Nears*, The Arizona Republic, Sept. 30, 2007, at A1.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the Court should reverse the judgment of the Court of Appeals for the Ninth Circuit with instructions to vacate the judgment of the District Court.

Respectfully submitted,

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