Case Nos. 07-17272, 07-17274,
08-15359, 08-15360

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA CONTRACTORS ASSOCIATION, INC., et al.,

PLAINTIFFS – APPELLANTS,

v.

CRISS CANDELARIA, et al.,

DEFENDANTS-APPELLEES.

AND CONSOLIDATED CASES

(U.S. District Court (N.D. Cal.)
(Case No. CV-07-01355-NVW)

MOTION IN SUPPORT OF PROPOSED BRIEF OF *AMICI* CURIAE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS' OPENING BRIEF

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COMES NOW the National Federation of Independent Business Small Business Legal Center and the Associated Builders and Contractors, through its Counsel Leslie R. Stellman and Hodes, Pessin & Katz, and submits this Motion for Leave to File a Brief as Amicus Curiae in support of Plaintiffs-Appellants Arizona Contractors Association, Incorporated, *et al.* in the above-captioned case. As reasons for this Motion, the National Federation of Independent Business Small Business Legal Center and the Associated Builders and Contractors state:

1. The National Federation of Independent Business ("NFIB") is a 501(c)(3) tax-exempt public interest organization. It is the nation's leading small-business advocacy association, with offices in Washington, D.C. and all 50 state capitals.

2. NFIB's Small Business Legal Center is responsible for promoting the advocacy interests of the NFIB and its member organizations.

3. NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses.

4. NFIB's Arizona members have an interest in the pending litigation; there are more than 10,000 NFIB members in Arizona that will be immediately impacted by the Legal Arizona Workers Act, A.R.S. §§ 23-211 – 23-214.

5. The Associated Builders and Contractors, Inc. ("ABC") is a national construction industry trade association representing nearly 25,000 individual employers in the commercial and industrial construction industry.

6. Small businesses represent over 70 percent of ABC's membership, which is comprised of 78 chapters nationwide.

7. Most of ABC's member companies participate in the "merit shop" philosophy, which is grounded on the principle of full and open competition, without regard to labor affiliation.

8. ABC's Arizona members have an interest in the pending litigation.

9. Because at least one of their members are subject to the law, and because the amicus brief is germane to both NFIB's and ABC's organizational objectives, it is appropriate for the NFIB Small Business Legal Center and the Associated Builders and Contractors to submit an amicus brief in this case. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197 (1975); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434 (1977).

10. The Legal Arizona Workers Act is *per se* violative of the Dormant Clause of the United States Constitution. U.S. Const., Article I, Section 8, Clause 3.

11. Assuming, *arguendo,* that the Legal Arizona Workers Act does not constitute a *per se* violation of the Dormant Commerce Clause, it is appropriate to determine whether the state statute is unconstitutional, according to the standard developed in *Pike v. Bruce Church, Inc*, 397 U.S. 137, 90 S.Ct. 844 (1970).

12. The proposed amicus brief, attached to this Motion, discusses why the Legal Arizona Workers Act is violative of the Dormant Commerce Clause.

13. The accompanying *amicus* brief addresses the economic impact which the Legal Arizona Workers Act will have on small- and medium-sized businesses in Arizona and beyond.

14. The Legal Arizona Workers Act is violative of business owners' rights under the Fourth Amendment of the United States Constitution, because it was outside the authority of the Arizona legislature to grant state agents the authority to conduct warrantless searches. U.S. Const., Amend. 4; *see also New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636 (1987); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534 (1981).

15. The Legal Arizona Workers Act will lead to more immigration-related and national origin discrimination, in violation of federal law. *Incalza v. Fendi North America, Inc.,* 479 F.3d 1005 (9th Cir. 2007); *see also Rivera v. NIBCO, Inc.,* 364 F.3d 1057 (9th Cir. 2004).

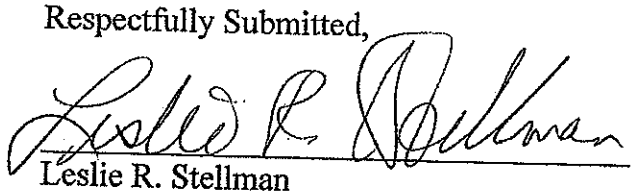
16. The Legal Arizona Workers Act impedes upon federal immigration law, and not merely state licensing law.

17. Appellants did not address these arguments in their existing appellate brief to the 9th Circuit. *See Circuit Advisory Committee Note to Rule 29-1.* Because Appellants in this appeal did not discuss the impact of the Legal Arizona Workers Act on interstate commerce, and whether the impact on interstate commerce is constitutionally permissible, it is appropriate for this Court to grant leave for Amicus to file the accompanying brief.

18. *Amici* NFIB Small Business Legal Center and the Associated Builders and Contractors obtained permission from the parties to file this *amicus* brief.

WHEREFORE, for the above reasons, the National Federation of Independent Businesses Small Business Legal Center and the Associated Builders and Contractors respectfully request that this Honorable Court grant its request for leave to file an Amicus brief in the above-captioned case.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the Motion in Support of the Brief of Amici Curiae, National Federation of Independent Businesses Small Business Legal Center and the Associated Builders and Contractors, In Support of Plaintiffs-Appellant's Opening Brief was sent via **FEDERAL EXPRESS**, postage prepaid, to:

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI* CURIAE

The NFIB Small Business Legal Center, a 501(c)(3), tax-exempt public-interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business ("NFIB"),[1] the nation's leading small-business advocacy association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill this role as the voice for small business, the NFIB Small Business Legal Center frequently files amicus briefs in the courts "tell[ing] judges how the decision they make in a given case will impact small businesses nationwide." *Id.*

Associated Builders and Contractors, Inc. ("ABC") is a national construction industry trade association representing nearly 25,000 individual employers in the commercial and industrial construction industry. ABC represents both general contractors and subcontractors throughout the United States, with small businesses comprising over 70 percent of its membership. ABC also has 78 chapters located throughout the United States. The majority of ABC's member companies are

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[1] See the organization's website, located at: http://www.nfib.com/page/aboutLegal.html (last visited March 19, 2008).

"merit-shop" companies, and its diverse membership is bound by a shared commitment to the construction industry's merit-shop philosophy. The merit-shop philosophy is grounded on the principle of full and open competition, without regard to labor affiliation. The merit-shop philosophy helps ensure that taxpayers and consumers alike receive the most for their tax and construction dollar. Most importantly, the vast majority of its contractor members are small businesses.

ARGUMENT

I. The Legal Arizona Workers Act Is Violative of the Dormant Commerce Clause of the United States Constitution.

A. The Act is both a Per Se and *Pike* test violation.

The Legal Arizona Workers Act ("Legal Arizona" or the "Act") constitutes a *per se* violation of the Dormant Commerce Clause of the United States Constitution. It will create a discriminatory restriction on out-of-state business. Out-of-state businesses that have only a minimal or tangential presence in the state of Arizona will likely choose not to do business in the state of Arizona in order to avoid the strict regulations imposed by the Act. This will create an economic benefit to Arizona businesses, in the form of reduced competition.

Where a state law discriminates on its face against out-of-state businesses and acts favorably towards in-state businesses, the state law is violative of the

Dormant Commerce Clause of the United States Constitution. Legal Arizona creates such an impermissible impact on interstate commerce and is therefore constitutionally defective.

Alternatively, the Act constitutes a violation of the Dormant Commerce Clause under the lower standard applied in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The alleged public policy goal that the statute aims to achieve — regulation of the influx of unauthorized aliens into the Arizona workforce in order to increase the number of jobs for authorized workers — will impact interstate commerce because it will limit the number of businesses that conduct business in Arizona. The goal is ostensibly to reduce the number of unauthorized aliens in the workforce from five percent (5%) to zero. After weighing the goal against the means used to achieve that goal, the tremendous impact that the Act will have on interstate commerce does not justify the societal "gains" that it hopes to achieve. For this reason, the Act is violative of the Dormant Commerce Clause under the *Pike* analysis.

B. History and Analysis of the Commerce Clause.

The Commerce Clause of the United States Constitution provides that "Congress shall have the Power...[t]o regulate Commerce with foreign Nations, and among the several States." *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S.Ct. 1786, 1792 (2007), *citing*

U.S. Const., Art. I, §8, Cl. 3. Although the Constitution does not on its face limit the power of the States to regulate commerce, the Supreme Court has "long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." (Emphasis added.) *Id., citing Case of the State Freight Tax,* 15 Wall 232, 279 (1879); *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Society for Relief of distressed Pilots*, 12 How. 299, 318 (1852). This interpretation is the basis for the judicially-recognized "Dormant Commerce Clause." Where a State or local law unduly burdens interstate commerce, it is violative of the Dormant Commerce Clause and unconstitutional.

Commerce includes "all objects of interstate trade." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978). Thus, for example, where non-Arizona businesses engage in interstate commerce (*e.g.* sending road crews from a corporate headquarters in Oklahoma City to repair roads and bridges in Pima County, Arizona or shipping goods from a warehouse in Illinois to a warehouse in Tucson), those businesses are protected in their right to non-discriminatory engagement in commerce in any of the fifty United States or territories.

Violations of the Dormant Commerce Clause are categorized in two separate categories: *per se* and *Pike* test violations. *Per se* violations include statutes that are facially discriminatory towards out-of-state commercial enterprises or that have a disproportionately discriminatory impact on such enterprises. Violations under

to determine the constitutionality of the legislation. *Oregon Waste Systems Inc.*, 511 U.S. at 100-01. Under the strict scrutiny test, the courts must find the statute in question invalid unless it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* Strict scrutiny analysis is applied to statutes having a discriminatory impact on interstate commerce whether the statute is discriminatory on its face or in its effect. *Maine v. Taylor*, 477 U.S. 131, 138 (1986); *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (finding that a discriminatory effect can constitute improper economic protectionism, thereby subjecting the state to a higher level of constitutional scrutiny). *See, e.g., Granholm v. Heald*, 544 U.S. 460 (2005) (striking down discriminatory wine shipment laws that favor in-state businesses).

An example of a *per se* Commerce Clause violation occurred in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). At issue in *Edgar* was an Illinois statute that sought to regulate tender offers for the stock of Illinois corporations. The statute required that any tender offer be registered with the Illinois Secretary of State. The statute came under scrutiny when a Delaware corporation wanted to purchase shares of an Illinois corporation from a resident of Arkansas. The Supreme Court reviewed the statute under the strict scrutiny analysis because the transaction was regulated by Illinois law even though it took place wholly outside of Illinois. Applying this standard, the Court found the Illinois statute to be *per se* violative of

the Dormant Commerce Clause because it had an impermissible extraterritorial effect on interstate commerce. *Edgar*, 457 U.S. at 641.

Legal Arizona will have a discriminatory and highly disproportionate impact on out-of-state businesses. Faced with the possibility of being held to a higher standard of immigration law in Arizona, many out-of-state enterprises will avoid doing business in the state at all costs in order to avoid suffering civil penalties under both state *and* federal immigration statutes. For example, if an out-of-state employer who hires employees to do work in different states (*e.g.*, constructing new homes or completing road projects) becomes the target of an I-9 investigation as a result of an anonymous tip, then that employer (even if it maintains no offices or long-term physical presence in the state) will be subject to a time consuming and costly state-level investigation of its employees, with the possible result of being barred from lawfully conducting business in Arizona. Unscrupulous in-state employers acting in concert with local county officials authorized to enforce the law can easily manipulate the law to create an economic advantage over their out-of-state competitors. The only reasonable alternative for out-of-state employers will be not to do business in Arizona at all. Thus, the statutory scheme created by the Act will create discriminatory restrictions on out-of-state employers.

Because the Arizona statutory scheme will create discriminatory restrictions on out-of-state businesses the statute is constitutionally infirm unless the

government can prove that there was no other way to achieve the legitimate local interest by a non-discriminatory alternative. *Maine v. Taylor, supra.*

For reasons fully expounded upon in the Appellant's opening brief, immigration is not a legitimate matter of local interest, and thus the only rational "non-discriminatory alternative" would be to not enact the Act. Because it fails to promote a legitimate local interest, the Act does not satisfy this heightened standard of scrutiny.

In this case, local legislation dealing with an issue of national importance was utterly unnecessary. The United States Congress has enacted significant federal legislation over the past century to deal with the intricate issues related to immigration. Congress drafted a comprehensive, multi-faceted scheme of far-reaching laws that were meant to provide a uniform set of immigration guidelines for the United States. Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA") specifically to address the problem of unauthorized aliens in employment. Thus, Arizona's attempt to legislate immigration as a local interest is duplicative of federal enforcement efforts while, no doubt, also intended as a symbolic showing of the state's frustration with the federal government's handling

of the problem.[2] Either way, the Arizona law does not demonstrate that there was "no other non-discriminatory way" to achieve a legitimate state interest.

2. Violations of the Dormant Commerce Clause Under the *Pike* Test Standard.

Assuming, *arguendo*, that this Court determines that the Arizona statute does not constitute a *per se* violation of the Dormant Commerce Clause, it is appropriate to review Legal Arizona under the lower *Pike* test standard. The statute will unquestionably have a significant impact on interstate commerce. The *Pike* test would examine whether the impact on interstate commerce outweighs the putative local goal that the State statute seeks to remedy. 397 U.S. at 143. The Act, which is contradictory to already existing federal statutes, does not satisfy the requirements of the *Pike* test, and therefore violates the Dormant Commerce Clause.

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[2] In a written statement issued upon signing the legislation into law, Arizona Governor Janet Napolitano conceded that "Immigration is a federal responsibility, but I signed [the law] because it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs." Acknowledging that the foundation of the enforcement aspect of the law, the E-Verify program (which the law would make mandatory in Arizona), was seriously flawed, Governor Napolitano asked Congressional leaders for improvements to the program even as she signed into law a requirement that all employers utilize this yet fully unproven system to verify employment. (July 2, 2007 News Release by the Governor of Arizona, found at: http://www.governor.state.az.us/dms/upload/NR_070207_Employer%20Sanctions%20Release.pdf (last accessed April 3, 2008)). *See* Part IV, *infra,* for a discussion of the problems created by mandatory E-Verify use under the law.

The "putative local interest" that the statutory scheme purportedly addresses is the influx of undocumented, unauthorized aliens into the Arizona workforce (*see* Statement of Governor Napolitano; *footnote 2, supra.*) , while the District Court in this case discussed an entirely different interest, *viz*, the alleged "failure of the I-9 system." *Arizona Contractors Association, Inc. v. Napolitano*, 526 F.Supp.2d 968, 972-73 (D. Ariz. 2007). In outlining this alleged failure, the District Court quoted a 2007 Congressional Research Report which stated that there were an estimated 7.2 million unauthorized workers in the U.S. civilian labor force in March 2005, or roughly five percent (5%) of the United States workforce. *Id., citing* CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: UNAUTHORIZED EMPLOYMENT IN THE UNITED STATES: ISSUES AND OPINIONS (April 20, 2007).

Amici cannot necessarily disagree with the District Court's concern that the I-9 process presently in place is not as effective as it should be, and that too many illegals are hired based upon documents of questionable validity. But such concern is not sufficient a local interest to overcome the clear impact the Act will have on interstate commerce by, for instance, compelling all employers employing workers in Arizona to utilize a still unproven internet-based system ("E-Verify") to confirm compliance with Arizona's version of federal immigration employment law.

Even assuming, *arguendo*, that the statute was drafted and enacted in response to a putative local interest, its impact on interstate commerce is far too pervasive to permit its implementation, and it must fail the *Pike* test's balancing analysis. Because the policy behind the law is ostensibly to curb the flow of unauthorized aliens into the state of Arizona, the text of the statute must meet that need without impermissibly interfering with interstate commerce. Yet the Act has an extraterritorial impact on employers who are located in other states and who may, as discussed in Section IV, *infra*, be compelled by law in the states where they maintain physical headquarters *not* to use the same E-Verify system that they are required to use under Arizona law.

The law forces employers with as few as one (1) employee in Arizona to tailor their immigration compliance policy — something squarely within the purview of federal law — to fit the unique requirements of the State of Arizona despite contrary federal law and the possible proliferation of other state and local immigration laws with varying obligations. In short, interstate employers will undoubtedly find themselves hopelessly out of compliance in one or more states or communities, no matter how diligent their efforts to hire only lawful workers.

For instance, in August 2007, the Illinois legislature enacted a law (Public Act 95-0138) that states: "Employers are prohibited from enrolling in any Employment Eligibility Verification System, including the E-Verify *(formerly*

Basic Pilot) program, until the Social Security Administration and Department of Homeland Security databases are able to make a determination on 99% of the tentative non-confirmation notices issued to employers within 3 days, unless otherwise required by federal law." Similarly, Minnesota's Governor signed an executive order in January 2008 excusing that state's employers from participating in E-Verify. *Source*: www.verificationsinc.com/compliance-corner.html (last accessed April 3, 2008).

Already in conflict with these other state laws, the Arizona law has a substantial impact on interstate commerce. It plainly discourages businesses with even a single employee in Arizona from doing business in that state for fear of noncompliance with the law. Weighed against the proposed putative benefit — a five percent (5%) decrease in unauthorized workers in Arizona – the impact on interstate commerce far outweighs the benefit. This inevitable phenomenon will create a dearth of competition in industries across the board in Arizona. For this reason, Legal Arizona is not sufficiently narrowly tailored to survive *Pike* test analysis, and is violative of the Dormant Commerce Clause under this standard.

II. The Arizona Statute is Violative of the Fourth Amendment Prohibition Against Unreasonable Search and Seizure.

The Legal Arizona Workers Act is in direct contravention with established Fourth Amendment principles. Business owners — both in Arizona and nationally

— have a Fourth Amendment right to freedom from unreasonable searches and seizure by state agents in their business establishments. Unless the businesses operate in a "pervasively regulated" industry, explicitly waive their Fourth Amendment rights, or are presented with a warrant that clearly identifies probable cause for instituting a search of the business owners' premises, government agents may not enter upon their premises to conduct searches, even if only to examine personnel records. Legal Arizona, which is not a valid exercise of the state's power, does not validly abrogate business owners' rights to privacy in their business establishments.

The Fourth Amendment of the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. 4. The constitutional right to protection from unreasonable governmental searches and seizures applies to the premises of commercial business owners. *New York v. Burger*, 482 U.S. 691, 699 (1987) ("The Court long has recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises."). *See also Dow Chemical Co. v. U.S.*, 476 U.S. 227, 236 (1986) ("Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment.");

See v. City of Seattle, 387 U.S. 541, 543 (1967). Business owners, therefore, enjoy the right to be free from unreasonable searches and seizures. *Burger*, 482 U.S. at 699-700, *citing Katz v. United States,* 389 U.S. 347, 361 (1967).

Immigration regulation is a matter of national, not merely local, concern. In *Donovan v. Dewey*, 452 U.S. 594 (1981), the Supreme Court ruled that a narrowly-tailored federal statute that abrogates the warrant requirement of the Fourth Amendment for businesses to a limited degree may be permissible where the *federal* government is regulating interstate commerce, such as in the area of employment eligibility. Public policy favors consistent immigration regulation by the agency charged with the task of enforcing immigration laws. *See Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 147-48 (2002).

Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA") pursuant to its power to enact legislation in an effort to provide a uniform system of employment verification. 8 U.S.C.A. § 1324a; *see also* 8 C.F.R. § 274a.2 (implementing regulation). The statute and implementing regulation define the scope of administrative inspections: first, the statute requires that employers obtain certain types of governmentally-acceptable identification from each new hire, and that each employer verify (under penalty of perjury) that the documents are facially accurate by signing a Form I-9. The federal government

also requires that employers maintain I-9 forms and that those forms are readily available for inspection "by officers of an authorized agency of the United States." 8 C.F.R. § 274a.2(b)(2)(ii) (emphasis added). The accompanying regulation, 8 C.F.R. § 274a.2, defines with specificity the scope of warrantless inspections that federal agents may conduct at an employer's place of business upon actual notice. The regulation also defines a specific course of action that federal officials must take if business owners refuse access to employment verification records for inspection. Arizona business owners, therefore, must rightfully provide access to employment verification forms to appropriate federal agents. *Amici* certainly concede Congress' authority to inspect employment verification records of workers.

Amici do not believe, however, that county and state attorneys — agents of the Arizona government — have a constitutional right to inspect employment verification forms. There is no indication in either IRCA (8 U.S.C. § 1324a) or its enacting regulation (8 C.F.R. § 274a.2) that Congress granted to states the power to enact independent statutes granting to those states the right to inspect employment eligibility documents. Such permission is not granted by IRCA under *any* circumstances, whether the purpose is regulatory or punitive. Additionally, a state's attempt to regulate *all* Arizona businesses through this inspection process is far beyond the allowable scope of Fourth Amendment waivers, because states do

not have the right to regulate interstate commerce in a discriminatory manner. *See* Section I, *supra*.

By allowing either the Arizona Attorney General or the County Attorney of an Arizona county to initiate an investigation into alleged immigration violations, enforcement of the Act will result in Fourth Amendment violations affecting targeted businesses. Section 23-212(b), which authorizes Arizona officials to collect employment verification documents from business owners' premises in order to conduct state level investigations, gives those authorities the right to collect, inspect, and review businesses' employment records without obtaining a warrant.

Searches of employee verification records by state and local government employees will thus become a regular process in order to allow local officials to affirmatively prove an employer's "knowing" or "intentional" employment of undocumented foreign workers. Abrogating the warrant requirement for the states for this purpose falls far outside the permissible scope of warrantless investigations allowed only to Congress. *Donovan v. Dewey, supra.*[3] For this reason, the Act

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[3] *Donovan* upheld the right of *federal* agencies, under Congressional authorization, to conduct warrantless inspections of commercial enterprises engaging in or affecting interstate commerce where those searches are "sufficiently comprehensive and defined that the owner of [a] commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." 452 U.S. at 600.

violates businesses' Fourth Amendment rights against unreasonable searches and seizures.

III. The Arizona Statute Will Have a Chilling Effect on the Employment of Legal Immigrants and Will Lead to More Immigration-Related and National Origin Discrimination.

Central to IRCA are provisions intended to prohibit and severely sanction what the law characterizes as "unfair immigration-related employment practices." This includes discrimination against "any individual (other than an unauthorized alien . . .) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharge of the individual from employment (A) because of such individual's national origin, or (B) in the case of a protected individual, because of such individual's citizenship status." 8 U.S.C. § 1324b(1). Businesses with as few as three (3) employees are covered by this law, and businesses with fifteen (15) or more employees are subject both to this law and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which prohibits, *inter alia*, employment discrimination based upon national origin. *See, e.g., Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (recognizing the chilling effect on foreign-born employees if employers are allowed to "inquire into workers' immigration status" where workers file discrimination charges); *Incalza v. Fendi North America, Inc.*, 479 F.3d 1005 (9th Cir. 2007) (urging placement of immigrant workers on leave rather than termination where questions arise

concerning their immigrant status, in order to avoid national origin discrimination claims).

In *Incalza*, this Court expressed its disapproval of employers who, "concerned with liability under IRCA, would otherwise terminate those employees first and ask questions later." 479 F.3d at 1012. The Arizona statute here in issue would force an employer faced with an investigation launched by a local county attorney to promptly fire an employee whose immigrant status is challenged as an alternative to losing its business license, thus placing it in the impossible position of choosing between going out of business and violating Title VII.

Current federal immigration law still provides that at the time of initial hiring, compliance "in good faith with the requirements [of verification through the I-9 document examination process] with respect to the hiring . . . for employment of an alien in the United States . . . establish[es] an affirmative defense that [the employer] has not violated" the above provisions. 8 U.S.C. § 1324a(3). Adding a new layer of obligations for an employer seeking to hire foreign-born workers, with the risk that failure will result in the loss of a state-issued business license and thus the business' right to operate, will effectively prevent small business owners from feeding their families. The alternative will be to aggravate an already confirmed rise in national origin discrimination.

As members of the Tenth Circuit Court of Appeals observed in *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1189 (10th Cir. 2007) (dissenting from an *en banc* opinion): "In 1990, the General Accounting Office ('GAO') released a report to Congress, finding IRCA had indeed resulted in a 'serious pattern' of national origin discrimination. GAO, Employer Sanctions and the Question of Discrimination 5 (1990) ('GAO estimates that 461,000 (or 10 percent) of the 4.6 million employers in the survey population nationwide began one or more practices that represent national origin discrimination.')."[4]

The Office of Special Counsel of the Department of Justice's Office of Civil Rights, which enforces the immigration-related discrimination law contained in 8 U.S.C. § 1324b, still posts on its website the following advice for employers:

> **Q. How can employers verify their employees' employment eligibility in a non-discriminatory manner?**
>
> A. Employers can demonstrate compliance with the law by following the verification (I-9 Form) requirements and treating all new employees the same.

Source: http://www.usdoj.gov/crt/osc/htm/facts.htm#verify (last accessed April 2, 2008). Employers of Arizona employees, suddenly faced with the additional

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[4] The type of discrimination prohibited by these referenced laws has increased dramatically since 1990, much of it driven by the daily debate over the so-called "illegal immigration" crisis in the media and the resultant political attention focused upon the issue. Thus, the EEOC reported that in 2007, nearly 10,000 charges of national origin discrimination were filed, reflecting a 30 percent increase in just the past ten (10) years. *Source*: http://www.eeoc.gov/stats/origin.html (last accessed April 2, 2008).

obligation to certify their employees through the now not-so-voluntary E-Verify program, can no longer rely on this advice, undoubtedly leading to confusion about how best to avoid costly discrimination lawsuits.[5] Spikes in national origin discrimination charges will not be long in coming.

Small employers in particular should not have to face the Hobson's choice of either losing their business license or violating the anti-discrimination prohibitions contained in both IRCA and Title VII. Compliance with the Arizona statute, however, will inevitably lead to a greater number of claims of illegal discrimination as employers, faced with an immediate obligation to terminate employees who fail verification under the still not fully tested E-Verify system, will be forced to fire workers rather than allow them the time to prove their legal

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[5] Employers found to have violated 8 U.S.C. § 1324b may be compelled to hire or reinstate employees, in addition to incurring civil penalties of up to $5,000 "for each individual discriminated against." 8 U.S.C. § 1324b(g)(iv). Employers guilty of discrimination on the basis of national origin in violation of Title VII may be liable for back and front pay, compensatory damages (up to $300,000 depending upon the size of the employer), and punitive damages, as well as attorney's fees. 42 U.S.C. § 1981a. Moreover, the courts have extended Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, which allows for **uncapped** damages against even the smallest employer, to Latino victims of national origin discrimination. *Ramirez v. Kroonen*, 44 Fed. Appx. 212 (9th Cir. 2002); *Associated General Contractors of California, Inc. v. Coalition for Economic Equity,* 950 F.2d 1401 (9th Cir. 1991); *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999), *cert. denied* 120 S.Ct. 843 (2000).

status.[6] *Incalza, supra*, 479 F.3d at 1012, *citing New El Rey Sausage Co. v. U.S. Immigration and Naturalization Service*, 925 F.2d 1153, 1157 (9th Cir. 1991). In *New El Rey*, this Court questioned whether a requirement "that employers immediately terminate employees without allowing the employees time to gather documents to prove their immigration status might raise constitutional concerns." 479 F.3d at 1012. *See also Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 568, n.1 (9th Cir. 1989) (suggesting that "a reasonable time frame" be established during which employers may verify information before terminating an employee without risking being deemed to have knowingly continued the employment of an undocumented alien).

Small businesses are particularly vulnerable to these pressures the Act will create. For this additional reason, the law should be deemed unworkable and plainly preempted by the federal laws prohibiting immigration-related and national origin discrimination.

IV. The Arizona Statute Unreasonably Mandates A Yet Untested, Unproven System of Verification, and Thus Goes Far Beyond A Mere Licensing Law.

In furtherance of Congress' constitutional authority "to establish a uniform rule of naturalization,"[7] the Immigration and Reform Act was enacted in 1986,

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[6] *Amici* incorporates by reference Appellant's comprehensive discussion regarding the problems with E-Verify, in addition to their own analysis about the "readiness" of E-Verify addressed in Part IV, *infra*.

[7] U.S. Constitution, Art. I, Section 8, cl. 4.

containing penalties for the unauthorized employment of undocumented aliens. Fearful lest state and local governments would place employers in the position of having to comply with a patchwork of different local statutes containing varying penalties for unlawfully employing undocumented foreign workers, Congress specifically included language in the law forbidding those governments from enacting laws that varied from the federal statute with respect to penalties and sanctions, with the limited exception of laws governing business licensure. 8 U.S.C. § 1324a(h)(2). While the District Court characterizes the E-Verify requirement of the Arizona law as part of merely a "licensing law," this requirement transmutes the statute into far more than a licensing or related law. Rather, Arizona's statute would impose specific obligations (such as mandatory use of the E-Verify system, which the District Court conceded would cost employers money and which led to the Court's finding that the Plaintiff employers had standing to bring suit, *Arizona Contractors Ass'n, Inc. v. Candelaria*, 534 F.Supp.2d 1034, 1036 (D.Ariz.2008)) on employers with even a single employee in the state. The threat of losing one's business license and one's charter to do business in Arizona is certainly an adequate incentive for business owners to comply with this mandatory requirement, regardless of its constitutionality.

That mandated use of the E-Verify system goes well beyond merely regulating business licenses is obvious. The Arizona law compels employers, on

pain of losing their *livelihood*, to spend money to access a not yet fully tested national system which has been widely criticized for both efficacy and accuracy, and to take other affirmative steps to verify the lawful status of their workforce that were never contemplated by the federal law. To call this a "licensing or related law" is pure sophistry. Employers are at risk of penalties imposed, not by the federal agency charged with enforcement of the nation's immigration laws, but by a local Arizona county attorney who, in response to an anonymous tip about an unidentifiable person, may report an employer, causing years of costly litigation for that employer by insisting that that employer knowingly or intentionally employed illegals and forcing the employer to promptly fire workers who, for one of hundreds of reasons, fail to receive the green light from the E-Verify system. The law then subjects targeted employers to follow onerous reporting requirements for years to follow.

The problem with the E-Verify program is that it is not yet fully tested and is still far from foolproof, which explains why it remains limited in its use to a relatively small number of employers across the country.[8] Four (4) other states have attempted to force employers to utilize the system, which under the Arizona

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[8] According to U.S. Citizenship and Immigration Services, only 52,000 of America's employers presently use the E-Verify system. There are, of course, vastly larger numbers of employers in the U.S. who do not use the system. *Source*: http://www.talkgwinnett.net/index.php?option=com_content&task=view&id=349 &Itemid=73 (Feb. 13, 2008) (last accessed April 2, 2008).

immigrant communities cannot be sure that their employment policies and practices will not be challenged even if, in good faith, the I-9 process is consistently used in verifying employment.

More and more frequently we have seen the impact of local governments that have taken unto themselves the role of immigration enforcer. Towns that were once thriving are struggling, with abandoned homes and empty stores, as both legal and illegal immigrants believe that overly broad local anti-immigrant legislation is intended to drive them away. In one poignant story, the *Washington Post* recently described job and business losses caused in Prince William County, Virginia directly attributed to community anti-immigration sentiment.[11] Again, controlling unlawful immigration in American workplaces is an admirable goal, but one that is properly pursued by the federal government.

Amici do not question the urgency of solving America's illegal immigration problem. Each of the presidential candidates has offered his or her vision of a solution. Even this past week the United States Government exercised its right to waive environmental restrictions along the U.S.-Mexican border for the purpose of

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[11] N.C. Aizenman, "In N.Va., a Latino Community Unravels: Job Losses and Prince William Law Hit Illegal Immigrants and Others" (March 27, 2008), found at: www.washingtonpost.com/wp-dyn/content/article/2008/03/26/AR200803260333_pf (last accessed April 2, 2008).

expediting the construction of a border fence,[12] which is undoubtedly America's first priority in order to address this acknowledged economic, social, and human problem. But America's national immigration problem cannot be solved through a patchwork of differing state and local laws which hold small and medium businesses hostage to the whims of local legislators and, in the case of Arizona, county attorneys who would put on an immigration enforcement hat and target those businesses which fail to live up to Arizona's unique and burdensome requirements.

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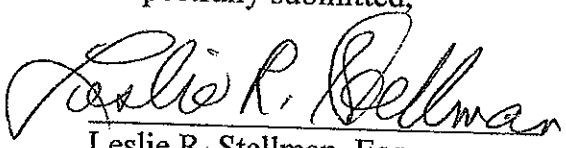
[12] See the announcement made by Homeland Security Secretary Michael Chertoff on April 1, 2008, which was widely reported in the media. *Source*: http://www.dhs.gov/xlibrary/assets/press_border_waivers_08-2177_All_Segments_Waiver_signed_040108.pdf (last accessed April 2, 2008).

CONCLUSION

For the foregoing reasons, *amici* National Federation of Independent Business Small Business Legal Center and the Associated Builders and Contractors urge the Court to REVERSE the decision of the District Court.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,921 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

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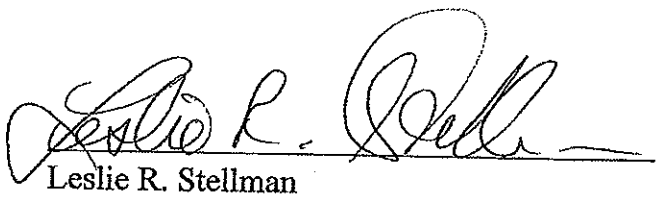

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April 7, 2008

Case Nos. 07-17272, 07-17274,
08-15359, 08-15360

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA CONTRACTORS ASSOCIATION, INC., et al.,

PLAINTIFFS – APPELLANTS,

v.

CRISS CANDELARIA, et al.,

DEFENDANTS-APPELLEES.

AND CONSOLIDATED CASES

(U.S. District Court (N.D. Cal.)
(Case No. CV-07-01355-NVW)

BRIEF OF *AMICI* CURIAE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF PLAINTIFFS-APPELLANT'S OPENING BRIEF

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