No. 09-115

IN THE

Supreme Court of the United States

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

v.

CRISS CANDELARIA *et al.*,
Respondents.

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

SUPPLEMENTAL BRIEF

ROBIN S. CONRAD
SHANE B. KAWKA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CARTER G. PHILLIPS*
ERIC A. SHUMSKY
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner Chamber of Commerce of the United States of America

* Counsel of Record

[Additional Counsel Listed Inside]

June 7, 2010

DAVID A. SELDEN
JULIE A. PACE
THE CAVANAGH LAW FIRM
1850 North Central Ave.
Suite 2400
Phoenix, AZ 85004
(602) 322-4000

BURT M. RUBLIN
BALLARD SPAHR LLP
1735 Market Street
51st Floor
Philadelphia, PA 19103
(215) 665-8500

Counsel for Petitioners Arizona Contractors Association; Arizona Chamber of Commerce; Arizona Employers for Immigration Reform; Arizona Farm Bureau Federation; Arizona Hispanic Chamber of Commerce; Arizona Landscape Contractors Association; Arizona Restaurant and Hospitality Association; Arizona Roofing Contractors Association; Associated Minority Contractors of America; National Roofing Contractors Association

DANIEL POCHODA
ACLU FOUNDATION OF ARIZONA
P.O. Box 17148
Phoenix, AZ 85011
(602) 650-1854

STEPHEN P. BERZON
JONATHAN WEISSGLASS
REBECCA SMULLIN
ALSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

LUCAS GUTTENTAG
JENNIFER CHANG NEWELL
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0770

STEVEN R. SHAPIRO
OMAR C. JADWAT
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street,
18th Floor
New York, NY 10004
(212) 549-2500

CYNTHIA VALENZUELA
MEXICAN AMERICAN
LEGAL DEFENSE AND
EDUCATIONAL FUND
634 S. Spring Street
11th Floor
Los Angeles, CA 90014
(213) 629-2512 x136

LINTON JOAQUIN
KAREN C. TUMLIN
NATIONAL IMMIGRATION
LAW CENTER
3435 Wilshire Blvd.
Suite 2850
Los Angeles, CA 90010
(213) 639-3900

Counsel for Petitioners Chicanos Por La Causa; Somos America; Valle Del Sol, Inc.

PAUL F. ECKSTEIN
JOEL W. NOMKIN
PERKINS COIE BROWN &
BAIN P.A.
2601 N. Central Avenue
Post Office Box 400
Phoenix, AZ 85001
(602) 351-8000

Counsel for Petitioner Wake Up Arizona! Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

SUPPLEMENTAL BRIEF

The brief filed by the Acting Solicitor General in response to this Court's invitation confirms that this case warrants review by this Court. The United States agrees that "[t]he issues presented by the petition … are important and recurring" and "warrant a grant of certiorari." U.S. Br. 8-9, 20. It confirms that multiple States have enacted statutes like the challenged provisions of the Legal Arizona Workers Act, which have "generated confusion among both employers and employees." *Id.* at 8-9. And, most fundamentally, it agrees with Petitioners that the Arizona law likely is preempted by federal law. *Id.* at 10-11 (discussing the Immigration Reform and Control Act of 1986 (IRCA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)). In each of these respects, the United States and Petitioners are in complete agreement.

The United States proposes, however, that this Court should limit its review to the first question presented—namely, whether the employer-sanctions provisions are *expressly* preempted—but deny review of (a) the E-Verify provision that is a fundamental component of the employer-sanctions provision, and (b) whether the employer-sanctions provisions are also *impliedly* preempted. *Id.* at 9-10. It, however, offers no persuasive justification for this artificial limitation. On the contrary, the United States itself demonstrates that the E-Verify provision is part and parcel of the employer-sanctions law, and that the challenged provisions are impliedly preempted, for many of the same reasons they are expressly preempted. These questions, no less than the issue concerning employer sanctions, are important and recurring, and were decided wrongly below. Moreo-

ver, the overlapping factual and legal issues among the three questions presented will enhance the Court's ability to evaluate the overall question of the relationship between federal and state laws regulating the employment of illegal aliens, which further justifies simply granting the petition.

I. WHETHER THE EMPLOYER-SANCTIONS PROVISIONS ARE EXPRESSLY PREEMPTED WARRANTS THIS COURT'S REVIEW.

The United States agrees that the Ninth Circuit erred when it held that the employer-sanctions provisions of the Arizona statute are not expressly preempted, and it agrees that certiorari should be granted on this issue. U.S. Br. 10-15. Those state provisions, the United States correctly explains, "disrupt[] the careful balance struck by Congress in IRCA." *Id.* at 9, 14. Moreover, they "impos[e] civil or criminal sanctions … upon those who employ [or hire] unauthorized aliens," and cannot be considered mere "licensing … laws," and therefore are expressly preempted. *Id.* at 10 (quoting 8 U.S.C. § 1324a(h)(2)). The validity of these provisions and their relationship to federal immigration policy constitute "an important question of federal law that has not been, but should be, settled by this Court." *Id.* at 9 (quoting Sup. Ct. R. 10(c)).

II. WHETHER THE MANDATORY E-VERIFY PROVISION IS IMPLIEDLY PREEMPTED WARRANTS THIS COURT'S REVIEW.

The United States also agrees that the Ninth Circuit badly erred in evaluating Arizona's mandatory E-Verify provision. U.S. Br. 15 (finding "substantial reason to doubt whether the Ninth Circuit was correct in holding that, under [IIRIRA], States may mandate participation in the federal E-Verify pro-

gram"). In an analysis that comprises the great majority of its discussion of E-Verify, the brief sets forth at least five reasons why this is so:

- Congress created E-Verify as a "voluntary" program and intended that "participation [would] be achieved through individual election rather than a blanket mandate on all employers." *Id.* at 16.
- 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." *Id.* at 17.
- "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." *Id.*
- "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." *Id.*
- "Absent congressional authorization nowhere present in this statute, a State may not restructure in this fundamental way [*i.e.*, by mandating participation] the regulatory relationships and functions of a federal agency." *Id.* at 18.

And, most fundamentally, the United States appears to agree that one of this Court's criteria for certiorari is met: The issue of mandatory E-Verify "raise[s]

'important federal question[s].'" *Id.* at 20 (second alteration in original). Nevertheless, the United States asserts that "this Court's review is not now warranted on the E-Verify question." *Id.* The reasons that it gives in passing, however, do not support its conclusion.

First, the United States says, "the Arizona statute contains no direct mechanism for enforcing its requirement that all employers use E-Verify." *Id.* The significance of an independent "enforcement mechanism," however, is unclear. The Arizona statute mandates the use of E-Verify and links substantial benefits to its use. It provides unequivocally that "every employer, after hiring an employee, shall verify the employment eligibility of the employee through the e-verify program." Ariz. Rev. Stat. § 23-214. The Arizona Department of Revenue instructed Arizona employers that they must comply. Pls./Appellant's Excerpts of Rec. 297-99, No. 07-17272 (9th Cir. filed Mar. 31, 2008). There are no exceptions to the requirement, and no reason to doubt that employers will feel compelled to comply with this clear mandate. On the contrary, non-compliance leads to the denial of state economic development incentives, see Ariz. Rev. Stat. § 23-214 (as the United States acknowledges, U.S. Br. 20). And, more fundamentally, E-Verify is an important component of the employer-sanctions provision that the Court would be reviewing anyway: The use of E-Verify "creates a rebuttable presumption that [the] employer did not knowingly employ an unauthorized alien" in violation of the Act. Ariz. Rev. Stat. § 23-212(I). A state provision that mandates participation in E-Verify conflicts with the system designed and enacted by Congress, see U.S. Br. 15-18, and warrants this Court's review.

Second, the United States says that E-Verify is a "still-evolving federal program whose nature and scope … may change again in the near future." *Id.* at 20. But this is true of numerous statutes, and could justify denying review in nearly every statutory case. Notably, however, the United States offers no assurance or prediction that E-Verify is *likely* to change in any meaningful particular. On the contrary, as the United States itself explains, E-Verify has been in existence since 1996, and has been reauthorized multiple times since then, see *id.* at 2-3—including as recently as 2009.[1] Proposals to make the system mandatory have been introduced on several occasions, and always rejected. *E.g.*, H.R. 98, 110th Cong., § 5(a) (2007); H.R. 1951, 110th Cong., § 3 (2007).

And in the meantime, numerous states continue to enact E-Verify-based statutes, in plain violation of the federal statute, see U.S. Br. 15-18, and contrary to the principle of uniformity that has consistently been a key congressional goal, see IRCA, Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384 (1986). In the few months since the Petition was filed, two more states have enacted E-Verify mandates (in addition to the six which previously required participation in E-Verify). See Utah Code Ann. § 13-47-201 (Utah S.B. 251 (2010)); Va. Code Ann. § 40.1-11.2 (Va. H.B. 737 (2010)); see also Pet. 15-16. Dozens of other state legislatures have considered similar proposals. See Nat'l Conf. of State Legislatures, *2010 Immigration-Related Bills and Resolutions in the States* (Apr. 27, 2010), http://www.ncsl.org/portals/1/documents/immig/immigration_report_april2010.pdf. To wait for two more years, as the United States proposes, to see

---

[1] Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 547, 123 Stat. 2142, 2177.

whether Congress revisits E-Verify is intolerable if, as Petitioners and the United States agree, these laws are unconstitutional.

Relatedly, the United States says that "issues regarding E-Verify should be resolved, at least in the first instance, by the political branches." U.S. Br. 20-21. This is not an argument against certiorari. Congress has spoken: It created E-Verify as an expressly voluntary program, "[to] be administered by federal employees using federal resources," and intentionally crafted the statute in a way that, as the United States acknowledges, "would appear to bar Arizona's mandate." *Id.* at 16-17. The question in this case is not whether Congress can or should act—it already has—but whether Congress's enactment should be interpreted to preclude state laws in the same field. That question is plainly one for the courts.

Third, the United States says that the E-Verify provision need not be reviewed because "[t]he Arizona statute is not *currently* creating a strain on federal resources." U.S. Br. 21 (emphasis added). Even accepting this curious statement as true,[2] burdens on the federal government are not the only ones that matter. Permitting states to impose different and conflicting verification requirements imposes substantial burdens on employers and employees alike. Among other things, Congress recognized that employers would face increased costs in developing hiring procedures, and may decline to employ individu-

---

[2] The word "currently" in the government's statement seems to have been chosen carefully. The United States concedes that "participation requirements imposed by [other] state or local governments may overload otherwise elective federal programs," U.S. Br. 17, and there is no question that states and localities are going to continue to enact laws mandating E-Verify and further strain federal resources, *supra* at 5.

als who appear to pose a risk of an immigration violation. Pet. 17-18. A report commissioned by the Department of Homeland Security found an increased risk of discrimination associated with mandatory E-Verify requirements. See Pet. Reply 2 n.1; see also Br. of *Amici Curiae* National Employment Law Project et al. 3-5; Br. of *Amici Curiae* Asian American Justice Center et al. These concerns that animate Congress to regulate comprehensively amply justify this Court's review, even if federal agencies are willing to suffer their own burdens.

Ultimately, the United States' discussion of the E-Verify provision makes clear that review is warranted. It explains at length that E-Verify mandates (like Arizona's) conflict with federal immigration policy approved by Congress, and are preempted under the Supremacy Clause. U.S. Br. 15-18. It notes that hundreds of similar immigration-related bills and resolutions are being introduced and considered in state legislatures across the country, and suggests that these provisions "raise significant legal issues" and, without guidance from this Court, will continue to "generate[] confusion among both employers and employees." *Id.* at 8-9. This is exactly why the implementation of E-Verify raises an "important federal question[]." *Id.* at 20 (quoting Sup. Ct. R. 10(c)).

III. WHETHER THE EMPLOYER-SANCTIONS PROVISIONS ARE IMPLIEDLY PREEMPTED WARRANTS THIS COURT'S REVIEW.

Finally, at the same time this Court considers whether the Arizona statute is *expressly* preempted—which the United States agrees is appropriate—it should at the same time consider whether the challenged provisions are *impliedly* preempted. The United States argues that "the Court need not consider any questions of implied preemption" because

the employer-sanctions provisions are in fact expressly preempted by 8 U.S.C. § 1324a(h)(2). U.S. Br. 21-22. Petitioners certainly agree that there is express preemption, but of course it is possible that this Court might conclude otherwise—in which case the Court should have the implied preemption issue available and fully briefed in order fully to evaluate the Supremacy Clause implications of Arizona's intrusion into immigration policy.

If this Court grants certiorari to consider express preemption, there is no good cause to ignore implied preemption. Both theories were pressed and passed upon below, and the same basic considerations underlie both inquiries: the statute's language,[3] structure,[4] purpose and history,[5] and the overall statutory and regulatory scheme.[6] The "ultimate touchstone" of any preemption analysis—express or implied—is the "purpose of Congress." *E.g.*, *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1194-95 (2009) (implied); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485-86 (1996) (express). As this Court has explained, "express preemption" and "implied preemption" are not "rigidly distinct" categories, but rather describe different applications of a common doctrine. *English* v. *Gen. Elec. Co.*, 496 U.S. 72,

---

[3] *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 875-78 (2000) (implied); *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) (express).

[4] *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 286 (1995) (express); *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 87-88 (1990) (implied).

[5] *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440-42 (2002) (express); *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 493-94 (1987) (implied).

[6] *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 441-45 (2005) (express); *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (implied).

78-79 & n.5 (1990). Notwithstanding the "terminological" difference, *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000), this Court has consistently recognized that the two concepts are intertwined, and has routinely considered both aspects of preemption when raised. *E.g.*, *id.*; see also, *e.g.*, *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538, 543 (2008) ("Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose."); *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 673 n.12 (1993) (rejecting a claim of implied preemption "on the basis of the preceding [express preemption] analysis").

The United States' own brief indeed demonstrates that these questions are entwined. It argues, for instance, that the Arizona statute disrupts the "careful balance struck by Congress in IRCA." U.S. Br. 12-14 (citing *United States* v. *Locke*, 529 U.S. 89, 106-07 (2000)). It makes this point in the context of express preemption, but the point equally supports implied preemption, and shows the artificiality of limiting the Court's focus in this case. See, *e.g.*, *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989). Given the overlap among these issues, and to ensure that the constitutionality of the Arizona Act (and similar state provisions) is fully addressed in this case—leaving no unnecessarily unresolved issues that otherwise would require further litigation in the lower courts—the most reasonable and efficient course is to grant certiorari to consider both implied and express preemption.

The remainder of the United States' argument is devoted to distinguishing *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137 (2002). U.S. Br. 21-22. *Hoffman* may not be on all fours with this case, but it plainly stands for the proposition—which

the United States elsewhere embraces, U.S. Br. 15, and which the Ninth Circuit erroneously ignored, Pet. App. 39a-40a—that this Court's earlier decision in *De Canas* v. *Bica*, 424 U.S. 351 (1976), described a federal legislative landscape that no longer exists.[7] That the United States may not want certain aspects of *Hoffman* put at issue is understandable, and Petitioners have no objection to a modest reframing of the Questions Presented to that end.[8] What is important, and what the United States does not meaningfully dispute, is that this Court consider express and implied preemption together.

---

[7] *See* Pet. 20-22; *Hoffman*, 535 U.S. at 147 (IRCA created a "comprehensive scheme" for regulating the employment of undocumented aliens and "forcefully made combating the employment of illegal aliens central to the policy of immigration law"; discussing and distinguishing *De Canas*) (alteration omitted).

[8] This could be accomplished, for example, by deleting the citation to *Hoffman* in the third question.

CONCLUSION

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

Respectfully submitted,

ROBIN S. CONRAD
SHANE B. KAWKA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CARTER G. PHILLIPS*
ERIC A. SHUMSKY
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner Chamber of Commerce of the United States of America

DAVID A. SELDEN
JULIE A. PACE
THE CAVANAGH LAW FIRM
1850 North Central Ave.
Suite 2400
Phoenix, AZ 85004
(602) 322-4000

BURT M. RUBLIN
BALLARD SPAHR LLP
1735 Market Street
51st Floor
Philadelphia, PA 19103
(215) 665-8500

Counsel for Petitioners Arizona Contractors Association; Arizona Chamber of Commerce; Arizona Employers for Immigration Reform; Arizona Farm Bureau Federation; Arizona Hispanic Chamber of Commerce; Arizona Landscape Contractors Association; Arizona Restaurant and Hospitality Association; Arizona Roofing Contractors Association; Associated Minority Contractors of America; National Roofing Contractors Association

DANIEL POCHODA
ACLU FOUNDATION OF ARIZONA
P.O. Box 17148
Phoenix, AZ 85011
(602) 650-1854

STEPHEN P. BERZON
JONATHAN WEISSGLASS
REBECCA SMULLIN
ALSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

LUCAS GUTTENTAG
JENNIFER CHANG NEWELL
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0770

STEVEN R. SHAPIRO
OMAR C. JADWAT
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street,
18th Floor
New York, NY 10004
(212) 549-2500

CYNTHIA VALENZUELA
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 S. Spring Street
11th Floor
Los Angeles, CA 90014
(213) 629-2512 x136

LINTON JOAQUIN
KAREN C. TUMLIN
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Blvd.
Suite 2850
Los Angeles, CA 90010
(213) 639-3900

Counsel for Petitioners Chicanos Por La Causa; Somos America; Valle Del Sol, Inc.

PAUL F. ECKSTEIN
JOEL W. NOMKIN
PERKINS COIE BROWN &
BAIN P.A.
2601 N. Central Avenue
Post Office Box 400
Phoenix, AZ 85001
(602) 351-8000

Counsel for Petitioner Wake Up Arizona! Inc.

June 7, 2010 * Counsel of Record