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.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

Federal immigration law expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324a(h)(2). The Legal Arizona Workers Act, an Arizona statute, imposes civil sanctions on employers that knowingly or intentionally employ an unauthorized alien, up to and including the mandatory revocation of articles of incorporation, partnership agreements, and other documents that the Arizona statute defines as "licenses." The questions presented are:

1. Whether the Arizona statute is saved from express preemption as a "licensing [or] similar law[]."

2. Whether the Arizona statute conflicts with the federal framework regulating the employment of unauthorized aliens and therefore is impliedly preempted.

3. Whether the Arizona statute's requirement that all employers participate in a federal electronic employment verification system conflicts with, and is preempted by, the federal law establishing that verification system, which provides that participation shall be voluntary.

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INTEREST OF THE UNITED STATES

This case presents the question whether provisions of the Legal Arizona Workers Act (Arizona statute), Ariz. Rev. Stat. Ann. §§ 23-211 *et seq.*,[1] are preempted by federal law regulating the employment of aliens. The Department of Homeland Security (DHS) and Department of Justice enforce the prohibition against hiring unauthorized aliens, and the corresponding nondiscrimination provisions, that were enacted in the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. See 8 U.S.C. 1324a, 1324b. DHS

[1] Unless otherwise indicated, Arizona statutory provisions appear in the 2009 supplement.

now administers the voluntary E-Verify program originally created by Title IV of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-655. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. a. Before 1986, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, did not specifically regulate the employment of unauthorized aliens. *De Canas* v. *Bica*, 424 U.S. 351 (1976). Congress changed course in IRCA, concluding that measures to prevent employers from hiring unauthorized aliens were necessary to reduce the incentive for aliens to come to the United States illegally. See, *e.g.*, H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 46 (1986) (IRCA Report).

IRCA added two new provisions to the INA that are relevant here. The first prohibits employers from hiring unauthorized aliens and authorizes sanctions against employers that violate that prohibition. The second applies a parallel set of civil-rights protections to ensure that employers do not engage in racial, ethnic, or other invidious discrimination against legal immigrants and other minorities.

The employer-sanctions provision, 8 U.S.C. 1324a, prohibits employers from hiring for employment "an alien knowing the alien is an unauthorized alien," as well as hiring any individual "without complying with the requirements of [8 U.S.C. 1324a(b)]." 8 U.S.C. 1324a(a)(1). Subsection (b), in turn, establishes the paper-based "I-9 system," pursuant to which an employer must examine specified documents to verify a

new employee's identity and authorization to work in the United States. 8 U.S.C. 1324a(b); 8 C.F.R. 274a.2.

Employers that violate these requirements may be sanctioned. Immigration and Customs Enforcement (ICE), within DHS, brings such charges; an employer may seek a hearing before an administrative law judge (ALJ) in the Department of Justice. The ALJ may assess civil monetary penalties and issue cease-and-desist orders. Any sanctions may be reviewed in an administrative appeal and then by a federal court of appeals. 8 U.S.C. 1324a(e); 8 C.F.R. 274a.9(e) and (f); 28 C.F.R. 68.1 *et seq.*; see 8 C.F.R. 1.1(c). Employers that engage in a pattern or practice of violating the requirements may also be criminally prosecuted, enjoined, or restrained in proceedings brought in federal district court by the Attorney General. 8 U.S.C. 1324a(f). Good-faith compliance with the I-9 system generally establishes "an affirmative defense" against charges of knowingly employing an unauthorized alien. 8 U.S.C. 1324a(a)(3) and (b)(6).

Section 1324a expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324a(h)(2).

b. In 1996, Congress directed the Attorney General (who was then responsible for immigration enforcement) to "conduct 3 pilot programs of employment eligibility confirmation." IIRIRA § 401(a), 110 Stat. 3009-655. The first (originally called the Basic Pilot Program) has evolved into what is now called E-Verify. (The other two pilot programs no longer exist.) E-Verify "is an internet-based system that allows an employer to verify an employee's work-authorization status." Pet. App. 10a. An

employer that participates in E-Verify and uses that system to confirm a new employee's identity and employment authorization is rebuttably presumed not to have knowingly hired an unauthorized alien. IIRIRA § 402(b), 8 U.S.C. 1324a note.[2]

In IIRIRA, Congress required that federal departments participate in one of the three pilot programs. § 402(e)(1)(A)(i). Employers that violate Section 1324a or 1324b also may be required to participate. § 402(e)(2). Subject to those exceptions, however, Congress provided that "the Attorney General may not require any person or * * * entity to participate in a pilot program." § 402(a), 110 Stat. 3009-656. Instead, IIRIRA states that an employer "may elect to participate in [a] pilot program," and describes such participation as "voluntary." *Ibid.*; see § 402(d)(2) and (3)(A) (referring to program's "voluntary nature").

The pilot program was originally to last four years and to be made available in at least "5 of the 7 States with the highest estimated population of aliens who are not lawfully present in the United States." § 401(b) and (c), 110 Stat. 3009-655 to 3009-656. Since 1996, Congress has on four occasions extended the program's term.[3] In the 2003 extension, Congress substituted the Secretary of Homeland Security (Secretary) for the Attorney Gen-

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[2] Unless otherwise indicated by a parallel citation from the Statutes at Large, references to sections of IIRIRA refer to the statute as subsequently amended and set out at 8 U.S.C. 1324a note.

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

eral, and directed the Secretary to make E-Verify available in all 50 States. 2003 Act, § 3(a) and (d), 117 Stat. 1944, 1945; IIRIRA § 401(c)(1). The E-Verify program is currently authorized through September 30, 2012. 2010 Act, § 547, 123 Stat. 2177.

2. a. The Arizona statute makes it a violation of state law for an employer to "knowingly" or "intentionally" employ "an unauthorized alien," and provides for enforcement of that prohibition in actions brought in state court by elected county attorneys. Ariz. Rev. Stat. Ann. §§ 23-212(A) and (D), 23-212.01(A) and (D). The Arizona statute defines "[u]nauthorized alien" by reference to federal law. *Id.* § 23-211(11) (incorporating 8 U.S.C. 1324a(h)(3)). In determining whether a particular alien meets that definition, the Arizona statute first provides that a state court "shall consider only the federal government's determination pursuant to 8 [U.S.C.] 1373(c)," *id.* §§ 23-212(H), 23-212.01(H), which requires federal officials to respond to inquiries about "the citizenship or immigration status of any individual." In its next sentence, however, the Arizona statute states that "[t]he federal government's determination" pursuant to Section 1373(c) creates only "a rebuttable presumption of the employee's lawful status." *Ibid.*

The Arizona statute does not require a prior federal determination of whether an employer knowingly or intentionally employed an unauthorized alien. Instead, the statute provides for the state court to make its own determination, subject to two evidentiary rules that refer to federal law. First, an employer's demonstration that it verified the employee's work authorization through the federal E-Verify program "creates a rebuttable presumption" that the employer did not violate the Arizona statute. Ariz. Rev. Stat. Ann. §§ 23-212(I),

23-212.01(I). Second, as under Section 1324a(a)(6), an employer "establishes an affirmative defense" to liability under the Arizona statute if it shows "that it has complied in good faith with the requirements of 8 [U.S.C.] 1324a(b)." *Id.* §§ 23-212(J), 23-212.01(J).

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

Any first violation results in three to five years of probation. An employer on probation must file quarterly reports with respect to every new hire at the business location where the previous violation occurred. Ariz. Rev. Stat. Ann. §§ 23-212(F)(1)(b), 23-212.01(F)(1)(b). If the state court finds that an employer has committed a violation (whether knowing or intentional) while on probation, the court "shall order the appropriate agencies to permanently revoke all licenses" at the business location of the violation or the primary place of business. *Id.* §§ 23-212(F)(2) and (3)(b), 23-212.01(F)(2) and (3)(b).

The Arizona statute includes a general definition of a "[l]icense" as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state." Ariz. Rev. Stat. Ann. § 23-211(9)(a).

The Arizona statute further provides, however, that "[l]icense" also includes the organizing documents of corporations, partnerships, and limited liability companies. See *id.* § 23-211(9)(b)(i)-(ii). "Any professional license" is excluded, as are certain water and environmental permits. *Id.* § 23-211(9)(c).

c. The Arizona statute also requires that all employers "verify the employment eligibility of [every newly hired] employee through the [federal] e-verify program." Ariz. Rev. Stat. Ann. § 23-214(A). Failure to use E-Verify renders an employer ineligible for "any grant, loan or performance-based incentive from any [state or local] government entity." *Id.* § 23-214(B).

3. Petitioners brought this action to enjoin enforcement of the Arizona statute as expressly and impliedly preempted by federal law. After a bench trial on stipulated facts, the district court concluded that the Arizona statute is not preempted. Pet. App. 49a-94a.

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

a. The court of appeals first concluded that the Arizona statute's employer-sanctions provisions fall within the savings clause permitting States to impose sanctions "through licensing and similar laws." 8 U.S.C. 1324a(h)(2); see Pet. App. 14a-19a. Relying on *De Canas, supra*, the court of appeals applied a presumption against preemption "because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers." Pet. App. 16a. The court also determined that the Arizona "statute's broad definition of 'license' is in line with" the dictionary definition of the term and that IRCA's legislative history did not require a different result. *Id.* at 17a-18a.

The court further concluded that the employer-sanctions provisions are not impliedly preempted by federal law. Pet. App. 21a.

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

SUMMARY OF ARGUMENT

I. The Arizona statute is expressly preempted because it does not fit into the narrow exception for "licensing and similar laws." The statute prohibits employing unauthorized aliens and punishes employers that violate that prohibition. That those employers happen to hold documents that the statute calls "licenses" does not turn the statute into a licensing law. No licenses are issued under the statute, and it does not regulate licensees' professional conduct or fitness to do a particular business. It only imposes punishment, and only for violation of a single, across-the-board rule. And the punishment it imposes extends far beyond any common understanding of "licenses": the Arizona statute provides for the suspension and termination of business

entities' very legal existence. Articles of incorporation and similar charters are not "licenses," and the Arizona statute's broad punitive sweep confirms that it is not a licensing law.

In addition, and independently, the Arizona statute is impliedly preempted because it upsets the careful balance that IRCA established. The INA permits federal officials to decide when to seek sanctions and requires them to do so within a carefully crafted framework of procedural and substantive protections, which include graduated penalties; specialized federal tribunals; federal judicial review; and civil-rights provisions that prevent discriminatory or overzealous enforcement. Not only does the Arizona statute omit these protections, it affirmatively contradicts them: it allows elected Arizona prosecutors to demand and obtain sanctions in Arizona courts even after federal officials decide to seek lesser penalties, or federal tribunals reject sanctions altogether. In finding no conflict with federal law, the court of appeals wrongly relied on *De Canas* v. *Bica*, 424 U.S. 351 (1976), which pre-dates and is superseded by Congress's determination in IRCA that restricting the employment of unauthorized aliens should be an essential part of the *federal* framework of immigration regulation. Indeed, the very state law upheld against a preemption challenge in *De Canas* was preempted by IRCA.

II. The requirement that employers enroll in E-Verify also conflicts with federal law and is preempted. Congress made voluntary participation a hallmark of E-Verify: the clear text provides that an employer "may" make a "voluntary election" to participate and "may terminate" that election. IIRIRA § 402(a) and (c)(3). The court of appeals erroneously relied on Congress's 2003 decision to give the program nationwide

scope; Congress did not thereby approve of any and all measures to expand participation.

ARGUMENT

I. FEDERAL LAW PREEMPTS THE ARIZONA STATUTE'S EMPLOYER-SANCTIONS PROVISIONS

The INA expressly preempts "any State or local law imposing civil or criminal sanctions * * * upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324a(h)(2). Neither respondents nor the court of appeals disputes that the Arizona statute is a sanctions law, Pet. App. 14a; Br. in Opp. 12, and all such laws are preempted unless they are "licensing and similar laws." Because the Arizona statute does not confer or administer any license to do anything, but instead creates an independent state-law prohibition against employing unauthorized aliens and prescribes a unique and mandatory sanction that sweeps far more broadly than the term "license" allows, the statute is not a "licensing [or] similar law[]" and is not saved from preemption.

The Arizona statute is also preempted because it disrupts the delicate balance that federal law embodies. Neither the savings clause nor principles of conflict preemption permit the States to undermine federal law in that manner.

A. The Arizona Statute Is Not A "Licensing Law"

The court of appeals erroneously concluded that because the Arizona statute mentions the term "license," it is within the scope of the savings clause. A mere intersection with "licenses" is not enough for a state statute to qualify as a "licensing * * * law[]." Rather, a licensing law must actually provide for the granting and

administration of licenses, not just the punishment of entities that happen to be licensees. Furthermore, the Arizona statute imposes sanctions that do not pertain to any "license" as Section 1324a uses that term.

1. No licenses are issued under the Arizona statute

The court of appeals' decision treated the savings clause as if it used the term "law related to licenses." Congress instead used the more specific term "licensing * * * law[]." "Licensing" is the participial form of a transitive verb. A licensing law, therefore, must at least be one pursuant to which licenses are granted to someone. Indeed, the court acknowledged that "'licensing' generally refers to '[a] governmental body's process of *issuing* a license.'" Pet. App. 17a (brackets in original; emphasis added) (quoting *Black's Law Dictionary* 940 (8th ed. 2004)). But the court then went on to hold that the Arizona law is saved from preemption as a licensing law because it "provides for the *suspension* of employers' licenses." *Ibid.* (emphasis added). That holding misapplied the ordinary meaning of "licensing."

The Arizona statute is not a "law" for the "licensing" of any activity, because no licenses are issued under the Arizona statute whatsoever. It does not establish an application process or any standards for assessing an applicant's fitness to engage in a particular type of activity. Its enactment did not require Arizona businesses to obtain state permission to engage in any new category of activity, nor did it provide a new way for businesses to obtain permission to engage in activities already requiring licensure. To the contrary, a large and paradigmatic category of licensing laws—those for the licensing of doctors, lawyers, and other professionals—are ex-

cluded from the Arizona statute altogether. Ariz. Rev. Stat. Ann. § 23-211(9)(b)(ii).

Instead, the Arizona statute provides only for the *suspension* or *revocation* of the various already-existing types of registrations that it defines, in sweeping terms, as "licenses." It appears as part of the state labor code, which principally regulates wages, hours, and working conditions, not licensure or fitness to do business.[4] And its new form of sanction does not fit within any existing framework for regulating licensees. The Arizona statute provides for an elected county attorney to request, and a court of general jurisdiction to order, that *all* licenses at a particular location be suspended or revoked. Indeed, for several categories of violations, suspension or revocation is mandatory. See Ariz. Rev. Stat. Ann. §§ 23-212(F)(2), 23-212.01(F)(1)(c) and (F)(2); see also *id.* §§ 23-212(F)(1)(c), 23-212.01(F)(1)(d) (mandatory suspension upon failure to file required affidavit). By contrast, virtually every true Arizona licensing statute empowers an expert regulatory agency to suspend or revoke a single license on specified grounds, with the choice of penalty—for even egregious misconduct—left to agency discretion. See, *e.g.*, *id.* § 4-210(A)(3), (8) and (12) (liquor license *may* be suspended or revoked based on felony conviction, association with racketeering, or knowing commission of perjury).

Thus, the Arizona statute does not create or provide for the issuance of any licenses, nor does it amend any law that does. Rather, it is a freestanding provision that specifies across-the-board penalties in the form of suspension or revocation of any existing license.

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[4] For the sole exception, see Ariz. Rev. Stat. Ann. §§ 23-521 *et seq.* (1995 & Supp. 2009) (licensure of private employment agents).

b. Such a single-purpose license-revocation law is not a "licensing law." Of course Congress understood that licensing laws *include* provisions for sanctioning licensees; that is why licensing laws fall within the scope of the express-preemption clause in the first place. But penalties are not automatically within the *exception* in that clause for "licensing * * * laws" merely because they are imposed on entities that happen to have received licenses under other provisions of state law. To the contrary, Congress's choice of the term "licensing law" indicates an intent simply to preserve a regulator's ability to evaluate its licensees' fitness to do business in its particular regulatory field—whether by conferring, withholding, renewing, or revoking a license. The Arizona statute, however, provides only for the punishment of entities that happen to be licensees; it lacks even the most elementary features of a licensing law.

Merely imposing a penalty on entities that happen to have received licenses does not amount to "licensing." For example, courts in criminal proceedings may sometimes order that licenses be suspended or forfeited, either as part of the criminal sentence or in a judgment of criminal forfeiture. See, *e.g.*, *United States* v. *Singh*, 390 F.3d 168, 190 (2d Cir. 2004) (criminal forfeiture of medical license); *Alvin* v. *State*, 42 P.3d 1156 (Alaska Ct. App. 2002) (criminal sentence including lifetime revocation of driver's license); *Brock* v. *State*, 299 S.E.2d 71, 72 (Ga. Ct. App. 1983) (criminal sentence including suspension of driver's license). But in ordinary usage, these criminal statutes are not "licensing laws."

2. The Arizona statute imposes sanctions on holders of documents that are not licenses

The court of appeals also erred in its conclusion that the Arizona statute defines the term "license" in a way that is "in line with" the federal statute's use of that term. Pet. App. 17a. Federal law controls the meaning of a term in a federal statute. See, *e.g.*, *Drye* v. *United States*, 528 U.S. 49, 58 (1999). The Arizona statute thus is not saved from preemption merely because Arizona chose to define the scope of its sanctions using the term "license." Rather, the sanctions must actually fall on "licenses" as Congress used that term. In fact, the Arizona statute extends far beyond any common understanding of "licensing." For that reason as well, it is not a "licensing law."

The court of appeals focused on the Arizona statute's general definition of "[l]icense" to include various forms of "authorization that [are] required by law and [are] issued by any agency for the purposes of operating a business in [Arizona]." Ariz. Rev. Stat. Ann. § 23-211(9)(a). But the Arizona statute also specifically treats as "[l]icense[s]" several other categories of documents, including "[a]rticles of incorporation," "[a] certificate of partnership [or] partnership registration," and a limited liability company's (LLC) "articles of organization." *Id.* § 23-211(9)(b). Indeed, even registration with the state agencies responsible for administering the state unemployment tax program—something every employer must do—appears to meet the law's definition of "license."[5] The inclusion of those documents makes

[5] See Arizona Dep't of Econ. Sec., *Who Pays Unemployment Taxes*, https://www.azdes.gov/main.aspx?menu=316&id=3962 (last visited Sept. 3, 2010); Arizona Dep't of Econ. Sec., *Arizona Joint Tax Applica-*

clear that the Arizona statute is not a licensing law, but simply a means of punishing anyone who hires unauthorized aliens.

A license is "a right or permission granted in accordance with law * * * to *engage in some business or occupation*, to do some act, or to engage in some transaction which but for such license would be unlawful." *Webster's Third New International Dictionary* 1304 (1993) (emphasis added). Simply creating a business entity such as a corporation is not a license to do anything that a sole proprietor could not previously have done. Filing the articles of incorporation, for instance, simply commences a corporation's existence, see Ariz. Rev. Stat. Ann. § 10-203; it does not confer a license to do any particular business, which (if needed) must be issued separately. See, *e.g.*, *Black's Law Dictionary* 829 (5th ed. 1979) (defining "license" as "[a] permit, granted by an appropriate governmental body, * * * *to a person, firm, or corporation* to pursue some occupation or to carry on some business") (emphasis added). The same is true of a certificate of limited partnership or an LLC's articles of organization. See Ariz. Rev. Stat. Ann. § 29-308 (1998); *id.* § 29-631. See generally *id.* § 29-842(A) (licensed professionals generally may practice in any business-entity form they choose).

Thus, articles of incorporation and the like pertain not to a business entity's fitness to engage in a particular type of pursuit or business, but to its very *existence*. The Arizona statute's revocation penalty therefore is unlike any conventional license revocation: a corporation, partnership, or LLC whose existence is terminated must wind up its affairs and proceed to liquidation. By

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tion, https://www.azdes.gov/main.aspx?menu=316&id=3960 (last visited Sept. 3, 2010).

contrast, a business that loses an ordinary license continues to be a going concern even if it cannot continue to run a particular establishment or engage in a particular line of work.

Accordingly, even if a law limited to the revocation of licenses could be characterized as a "licensing law," the Arizona statute is not such a law; it is altogether untethered to the common meaning of licensure.[6]

B. The Structure And History Of The Federal Employer-Sanctions Provisions Confirm That The Arizona Statute Is Not Saved From Preemption

Section 1324a's context, purpose, and history reinforce the conclusion that the Arizona statute is not a "licensing law" that Congress saved from preemption. This Court has long "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *United States* v. *Locke*, 529 U.S. 89, 106 (2000). And this Court has further warned that when "Congress has enacted a general rule," courts "should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception." *Knight* v. *Commissioner*, 552 U.S. 181, 191 (2008) (citation omitted). This Court should not read the savings clause to permit such subversion of the statutory purpose.

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[6] Likewise, respondents cannot show that the Arizona statute is a "similar law[]" even if it is not a "licensing * * * law[]." The phrase "or similar" simply eliminates dispute about whether a document constitutes a "license" if it is formally denominated a "certificate" or a "permit" (for example). By contrast, articles of incorporation are neither licenses nor materially "similar" to licenses.

1. The federal employer-sanctions provisions reflect a careful balance

IRCA created a federal regime that imposes sanctions on employers that hire unauthorized aliens. But Congress acknowledged the "widespread fear" that employers would, out of an abundance of caution, respond to the possibility of sanctions by engaging in "employment discrimination against Hispanics and other minority groups." IRCA Report Pt. 1, at 49. Congress therefore took steps to combat "the potential for [an] unfortunate cause and effect relationship between sanctions enforcement and resulting employment discrimination." *Id.* Pt. 2, at 12.

First, Congress provided various procedural protections and limits on liability for employers accused of violating Section 1324a by employing unauthorized aliens. Hearings are held before federal tribunals, and an employer may obtain federal administrative and judicial review of adverse decisions. 8 U.S.C. 1324a(e)(3)(B), (e)(8) and (f)(2); 28 C.F.R. 68.53-68.56. And sanctions under federal law are far less severe than the revocation penalty the Arizona statute permits: outside pattern-or-practice cases, see 8 U.S.C. 1324a(f)(1), monetary penalties under federal law are now limited to $3200 per unauthorized worker in the case of a first violation, $6500 for a second violation, and $16,000 for a subsequent violation. 8 U.S.C. 1324a(e)(4); 73 Fed. Reg. 10,130, 10,136 (2008) (inflation adjustment).

Second, Congress enacted Section 1324b, which makes it "an unfair immigration-related employment practice" to discriminate based on citizenship or immigration status or based on national origin, 8 U.S.C. 1324b(a)(1), and establishes an administrative regime to enforce that prohibition that is essentially parallel to

the regime to enforce Section 1324a. In particular, the schedule of civil penalties under the two statutes is the same. Compare 8 U.S.C. 1324a(e)(4)(A)(i)-(iii), with 8 U.S.C. 1324b(g)(2)(B)(iv)(I)-(III). The adoption of that parallel regime implements Congress's judgment that "sanctions enforcement and liability" for employers that hire unauthorized aliens "must be" balanced by "an equally strong and readily available remedy if resulting employment discrimination occurs." IRCA Report Pt. 2, at 12.

2. Congress expressly preempted state laws that would disrupt that balance, and the savings clause must not be read to frustrate that goal

State sanctions provisions—even those that incorporate federal standards in other respects—are expressly preempted because of the risk that they will disrupt the careful balance that Congress struck.

a. At the time of IRCA's enactment, several States had adopted employer-sanctions provisions. See, *e.g.*, United States GAO, *PAD-80-22, Illegal Aliens: Estimating Their Impact on the United States* 45-46 & tbl.12 (1980) (*GAO Report*). Those States imposed smaller maximum fines than Congress authorized in IRCA, compare *id.* at 45 (maximum fine $1000), with 8 U.S.C. 1324a(e)(4)(A) (maximum fine $2000 per alien for a first offense).[7] Congress nonetheless decided to preempt even those modest state sanctions, in the interest of ensuring that the federal framework—with charg-

[7] Some also authorized criminal penalties of up to a year of imprisonment. *GAO Report* 45-46 & tbl.12. All of those state statutes, civil and criminal, lay largely unused: as of 1980, 11 States had adopted sanctions legislation but only a single employer had been sanctioned (by Kansas, in the amount of $250). *Id.* at 45, 47.

ing decisions by federal officials, adjudication by federal ALJs and federal courts, and calibrated penalties—would be the exclusive enforcement method.

b. Congress decided to exempt only one small category—licensing laws—from preemption. As the statutory backdrop and the legislative history demonstrate, that proviso creates only a narrow exception, directed primarily at farm labor contractors, an industry often found to employ unauthorized aliens and in which there was a longstanding tradition of concurrent federal-state enforcement. The licensing laws governing farm labor contractors were everything the Arizona statute is not: they required a license to engage in particular work, prescribed qualifications for licensure, and provided for the denial or revocation of such a license based on unlawful acts germane to the licensee's fitness to do a particular business. See pp. 20-22, *infra*. And even in that context, Congress fashioned a calibrated federal framework to constrain the sanctions.

A House Committee Report on IRCA explained that Congress did not wish to preempt state licensing authorities from basing "the suspension, revocation or refusal to reissue a license" on the licensee's having "been found to have violated the sanctions provision *in this legislation.*" IRCA Report Pt. 1, at 58 (emphasis added); see Pet. App. 18a (quoting this passage). Thus, the committee agreed, the States could impose non-monetary licensing sanctions that were based on *federally adjudicated* hiring violations—violations for which the Attorney General (now ICE) had filed charges and a federal tribunal designated under Section 1324a had found the employer liable. Many state licensing laws take such an "adjudicated violation" approach, under which the state regulator considers prior convictions as part of the appli-

cant's character and fitness for licensure. See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 32-1232(C)(1), 32-1263(A)(2) (dentistry license may be denied or revoked based on conviction of a felony).

The committee also stated that it "d[id] not intend to preempt licensing or 'fitness to do business laws,' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting, or referring undocumented aliens." IRCA Report Pt. 1, at 58; Pet. App. 18a. Both federal and state law had long identified farm labor contractors as particular targets of regulation, and restrictions on their hiring and referral practices were particularly germane to that regulation.

Farm labor contractors provide seasonal labor to farmers when they need it. Beginning with the Farm Labor Contractor Registration Act of 1963 (FLCRA), 7 U.S.C. 2041 *et seq.* (1976), Congress had provided for the federal licensure and regulation of such contractors, in part because unscrupulous contractors "exploit * * * migrant agricultural laborers" whose unauthorized status could force them to accept substandard wages and working conditions. 7 U.S.C. 2041(a) (1976); see S. Rep. No. 1295, 93d Cong., 2d Sess. (1974). The law was truly a licensing law: it required all farm labor contractors to obtain a federal certificate of registration, and it provided that the certificate could be denied, suspended, or revoked if the contractor engaged in the kind of abuses that made federal licensing and oversight necessary, including if the contractor knowingly employed an unauthorized alien. 7 U.S.C. 2043, 2044(b)(6) (1976). In 1983, Congress replaced the FLCRA with the Migrant and Seasonal Agricultural Workers Protection Act (MSWPA), 29 U.S.C. 1801 *et seq.*, but continued to pro-

vide that a certificate could be denied, suspended, or revoked based on knowing employment of unauthorized aliens. See 29 U.S.C. 1813(a)(3), 1816 (1982).

Both the FLCRA and the MSWPA provided that they were "intended to supplement State action" and that "compliance with [the FLCRA or MSWPA] shall not excuse [a regulated entity] from compliance with appropriate State law and regulation." 7 U.S.C. 2051 (1976); 29 U.S.C. 1871. Indeed, Congress recognized that a number of States already had similar farm-labor-contractor licensing schemes. S. Rep. No. 202, 88th Cong., 1st Sess. 4 (1963).

By the time IRCA was enacted, at least two of the States with their own such schemes had specified that knowingly hiring illegal aliens would be a ground for revocation or denial of a farm-labor-contractor license. See Or. Rev. Stat. §§ 658.440(2)(d), 658.445(1) (Supp. 1983) (permitting revocation or denial of license if licensee or applicant "[k]nowingly employ[s] an [unauthorized] alien"); 43 Pa. Stat. Ann. §§ 1301.503(1), 1301.505(3) (West Supp. 1985) (permitting revocation or denial of certificate if licensee or applicant employs "any person with knowledge that such person is in violation of any provision of the [federal] immigration and naturalization laws").[8]

In IRCA, Congress explicitly sought to harmonize the INA's new employer-sanctions provisions with the existing federal-state licensing scheme for farm labor contractors. IRCA replaced the MSWPA's restriction on farm labor contractors' employing unauthorized

[8] Both States also authorized civil penalties for violations of their farm-labor-contractor regulations, including the hiring provision. Or. Rev. Stat. § 658.453(1)(c) (Supp. 1983); 43 Pa. Stat. Ann. § 1301.306 (West Supp. 1985); see also *id.* § 1301.606(a) (criminal penalties).

aliens with a provision, 29 U.S.C. 1813(a)(6), permitting the suspension or revocation of a farm labor contractor's license only after the contractor "has been found to have violated" Section 1324a(a) (which applies to all employers) by one of the federal tribunals specified in that section. See IRCA § 101(b)(1)(B) and (C), 100 Stat. 3372. And IRCA did not modify the MSWPA's nonpreemption provision permitting concurrent federal-state regulation of farm labor contractors, 29 U.S.C. 1871.

This history illuminates the intended scope of Section 1324a(h)(2)'s savings clause. Before IRCA, pursuant to the FLCRA and later the MSWPA, States could require farm labor contractors to obtain a state license, in addition to the required federal license, and could revoke or suspend the state licenses of contractors who knowingly hired unauthorized aliens. At least two States had such laws at the time of IRCA. The savings clause in Section 1324a(h)(2) preserved such arrangements: States can conclude that a finding by federal authorities under Section 1324a that a contractor has hired unauthorized aliens is germane to a particular licensing scheme if such hiring has been integral to abuses the state licensing scheme seeks to prevent.

c. The Arizona statute is fundamentally different from the narrow group of laws that Congress decided to save, for several reasons. *First*, the Arizona statute permits extraordinarily severe sanctions—up to and including the termination of a corporation's legal existence—to be sought by locally elected prosecutors and imposed by state courts of general jurisdiction, not under a specialized federal adjudicatory framework. Congress expressly preempted sanctions laws that imposed fines as low as $200, see *GAO Report* 46 tbl.12; it would be exceedingly odd for Congress to have precluded small

fines but permitted sanctions that suspend or terminate a business entity's very existence. *Second*, and relatedly, the Arizona statute's requirement that employers operate in the shadow of that sweeping sanctions regime frustrates the balance in the federal framework resulting from the procedural protections of Section 1324a and the corresponding prohibition on immigration-related unfair employment practices. *Third,* far from imposing a "'fitness to do business'" requirement germane to a particular industry or profession, IRCA Report Pt. 1, at 58, the Arizona statute imposes a blanket penalty on *any* business found to be in violation. The Arizona statute therefore is not saved from preemption, notwithstanding its nominal focus on "licenses."

C. The Arizona Statute Obstructs The Administration Of The Federal Employer-Sanctions Framework

Even if this Court were to conclude, contrary to our submission above, that the Arizona statute could come within the scope of the savings clause, Congress plainly did not abandon ordinary conflict-preemption principles in IRCA. See, *e.g.*, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) ("[N]either an express pre-emption provision nor a saving clause 'bar[s] the ordinary working of conflict pre-emption principles.'") (quoting *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869 (2000)) (second pair of brackets in original). Those principles independently require reversal of the decision below.

The Arizona statute's obstruction of Congress's goals and purpose is manifest. First, the Arizona statute permits Arizona prosecutors and courts to second-guess determinations made under the exclusive, carefully crafted federal framework for alleging and adjudicating

charges that an employer has knowingly employed unauthorized aliens. Federal law gives ICE authority to bring such charges; requires that federal tribunals decide whether the charges and defenses have been proved; and provides for appellate review by life-tenured federal judges. Although genuine state licensing laws may impose additional sanctions when a federal tribunal finds a violation and that violation is relevant to a licensee's fitness to do business, the INA does not permit a State to bring charges that ICE declined to bring, to find liability where the federal tribunal found none, or to impose sanctions beyond those provided under traditional licensing regimes.

Congress provided generally that federal immigration law "should be enforced vigorously *and uniformly*." IRCA § 115(1), 100 Stat. 3384 (emphasis added). Section 1324a itself makes clear that Congress did not countenance any state law requiring employers to litigate in a non-federal forum the lawfulness of their procedures to verify employment authorization. Congress specifically provided that the I-9 form, and copies of employees' associated documentation, may be used and retained only for purposes of complying with *specified federal laws*. See 8 U.S.C. 1324a(b)(5) ("A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of [the INA] and [specified federal criminal laws]."); see also 8 U.S.C. 1324a(b)(4) (restriction on use of copies of documentation); 8 C.F.R. 274a.2(b)(4). Congress recognized that requiring employers to gather identifying information from employees and retain copies of it throughout their employment posed significant privacy concerns, and it accordingly provided that those

documents would be reviewed only under the INA's *federal* enforcement framework, and associated criminal provisions. Accord IRCA Report Pt. 1, at 58 (Section 1324a does not preempt sanctions against a licensee "who *has been found* to have violated the sanctions provisions *in this legislation*") (emphases added). Yet under the Arizona statute, employers will likely need to use I-9 forms to prove that they complied with the I-9 procedure. See Ariz. Rev. Stat. Ann. §§ 23-212(J), 23-212.01(J).

Furthermore, Congress consciously rejected a regime that would have imposed sanctions without simultaneously protecting civil rights, because of the real and well-documented probability that such a law would lead employers to adopt discriminatory practices in an effort to avoid liability. Arizona has nonetheless adopted precisely such a sanctions-only regime, without the parallel procedural and civil-rights protections that IRCA included. See pp. 17-18, *supra*.

Against these considerations, the court of appeals erred in relying (Pet. App. 15a) on this Court's pre-IRCA decision in *De Canas* v. *Bica*, 424 U.S. 351 (1976). In *De Canas*, the Court rejected a preemption challenge to a California law barring employers from knowingly employing an unauthorized alien when doing so would have an adverse effect on lawful resident workers. *Id.* at 352. In reaching that conclusion, the Court observed that States had "broad authority under their police powers to regulate the employment relationship to protect workers within the State," and described the challenged law as "within the mainstream of" a State's police powers. *Id.* at 356.

But when *De Canas* was decided, federal law did not generally regulate the employment of unauthorized

aliens, unauthorized employment thus was only of "peripheral concern" under the INA, and the Court saw "Congress' failure to enact" such a law as evidence that "Congress believes this problem * * * is appropriately addressed by the States as a local matter." 424 U.S. at 360 & n.9. Since that time, however, Congress concluded in IRCA that the INA must prescribe measures to combat the employment of unauthorized aliens, because the availability of such employment undermines the INA's mission of regulating entry into the United States. See IRCA Report Pt. 1, at 46. Congress therefore enacted Section 1324a—just such a "general law[]" that makes it unlawful for employers to hire unauthorized aliens. *De Canas*, 424 U.S. at 360 n.9.[9] Congress thus has brought regulation of the employment of aliens within the INA's framework for regulation of immigration—traditionally an area of exclusive federal, not state or local, authority. Indeed, the very law at issue in *De Canas* would now be preempted by Section 1324a.

II. FEDERAL LAW SPECIFIES THAT E-VERIFY IS A VOLUNTARY PROGRAM AND PREEMPTS ARIZONA'S REQUIREMENT TO USE E-VERIFY

The court of appeals concluded that Arizona's requirement that all employers use E-Verify is not impliedly preempted for two reasons: because Congress did not expressly preempt it, Pet. App. 20a, and because Congress "envisioned and endorsed an increase in

[9] The court of appeals was correct that *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137 (2002), did not involve preemption. Pet. App. 16a. Petitioners cited *Hoffman* as an instance in which this Court recognized, albeit in a different context involving the interplay between two *federal* laws, the point made in the text: that since IRCA, it is no longer true that federal immigration law does not speak to employment of unauthorized aliens. See 535 U.S. at 147.

[E-Verify's] usage," *id.* at 21a. Neither reason can sustain the court of appeals' conclusion.

A. Ordinary Principles Of Conflict Preemption Apply

If a state law conflicts with a federal statute, by preventing the federal law from fully attaining Congress's goals or by interfering with the implementation of federal law, the state law is preempted. Contrary to the court of appeals' negative inference from the express preemption clause in Section 1324a—a provision that the E-Verify provisions of IIRIRA did not amend—those conflict-preemption principles apply whether or not the statute contains an express preemption clause and, indeed, whether or not the state law is saved from express preemption. See p. 23, *supra*. Whether the E-Verify requirement is preempted therefore turns on "ordinary * * * principles of conflict pre-emption." *Geier*, 529 U.S. at 874.

B. Congress Has Specified That E-Verify Should Grow Through Voluntary Enrollment, And The Arizona Statute Frustrates That Policy

The court of appeals concluded that the requirement to use E-Verify was not preempted because it did not think that the federal E-Verify statute reflected any congressional intent to "balance federal goals." Pet. App. 20a-21a. Rather, the court concluded that Congress's sole purpose was to encourage and expand E-Verify. That flawed understanding of the E-Verify statute was the basis for the court's erroneous preemption analysis. In fact, Congress has repeatedly specified that participation shall be voluntary, as one means of allowing E-Verify to grow at a measured pace and in a manner that encourages public acceptance, while the

program remains under evaluation, revision, and regular reconsideration by Congress.

1. The statutory text expressly specifies that participation in E-Verify shall be voluntary, with only a few enumerated exceptions

As part of a section entitled "Voluntary election to participate," and a subsection entitled "Voluntary election," Congress specified that employers "*may* elect to participate" in the E-Verify program. IIRIRA § 402(a) (emphasis added). The word "may" by itself suggests a discretionary decision. See, *e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010).

Subsection (e) of the "Voluntary election to participate" section, in turn, is entitled "Select entities required to participate in a pilot program." § 402(e). The only entities required to participate are federal employers and a small set of private employers—those that have been found to have violated Section 1324a or 1324b and are ordered by the federal administrative tribunal to participate in E-Verify. *Ibid.* With those specified exceptions, "the Secretary of Homeland Security may not require any person or other entity to participate." § 402(a). By specifying that participation shall generally be voluntary and then enumerating specified exceptions to that rule, Congress underscored its expectation that the general rule—voluntary participation—would apply wherever the express exceptions do not.

Congress also insisted that potential participants be informed that the program is voluntary. IIRIRA requires the Secretary to "widely publicize the [E-Verify] election process * * * including the *voluntary nature* of" the E-Verify program. § 402(d)(2) (emphasis added).

Likewise, the Secretary must designate persons in district offices "to inform persons and other entities that seek information about [E-Verify] of [its] *voluntary nature*." § 402(d)(3)(A) (emphasis added).

In accordance with those required explanations, Congress also specified that employers may limit or terminate their participation as they wish. For instance, employers may opt to participate only in particular States or particular hiring locations. § 402(c)(2)(A). And a participating employer "may terminate [its] election" by following the Secretary's prescribed procedures. § 402(c)(3). Indeed, throughout the statute, Congress repeatedly referred to program participants as "electing" persons or entities and called participation in the program "election." §§ 402(b)(2), (c)(1), (c)(2)(A) and (c)(2)(B), 403(a).[10]

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[10] In 2008, pursuant to his authority under the federal procurement statute, 40 U.S.C. 121(a), President Bush issued Executive Order No. 13,465, 3 C.F.R. 192 (2009), directing federal agencies to "require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the [Secretary] to verify the employment eligibility of" certain employees. § 3, 3 C.F.R. 193 (2009). The E-Verify program, "modified as necessary and appropriate," was designated as the verification system. 73 Fed. Reg. at 33,837. The Executive Order and the regulation promulgated to enforce it were challenged and were upheld. *Chamber of Commerce* v. *Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009), appeal voluntarily dismissed, No. 09-2006 (4th Cir. Dec. 14, 2009).

Unlike the Arizona statute, the federal rule requiring use of E-Verify by federal contractors does not fundamentally alter the voluntary nature of the E-Verify program. Federal contractors have, by definition, entered into a voluntary contractual relationship with the government. The agreement to use E-Verify, and fulfill the responsibilities that come

2. The history of E-Verify confirms that Congress has managed the program's growth by insisting upon voluntary participation

Voluntary participation is one of several ways in which the scope of E-Verify has been consciously circumscribed since its initial authorization. Congress created the initial Basic Pilot Program with a four-year time limit and a narrow scope, requiring only that it be offered to employers in at least five of the seven States with the highest concentration of unauthorized aliens. IIRIRA § 401(b) and (c)(1), 110 Stat. 3009-655 to 3009-656. Congress has since reauthorized it several times, in carefully circumscribed increments (see note 3,

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with it, becomes part of the larger—voluntary—agreement between government and private contractor. 648 F. Supp. 2d at 735-736.

The government also pointed out that the Executive Order, issued by the President and not by the Secretary, is not contrary to the statutory provision specifying that "the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program." In the course of that discussion, the United States noted that the Arizona statute's E-Verify requirement, too, is not *expressly* foreclosed by Section 402(a). Defs.' Reply Mem. in Supp. of Mot. for Summ. J. at 7, *Chamber of Commerce, supra* ("[T]he State of Arizona has required all public and private employers in that State to use E-Verify * * * . This is permissible because the State of Arizona is not the Secretary of Homeland Security.") (citations omitted); see Opp'n to Pls.' Emergency Mot. for Inj. Pending Appeal at 13-14, *Chamber of Commerce* v. *Napolitano*, No. 09-2006 (4th Cir. filed Sept. 6, 2009) (similar). That statement did not address the question here—whether, in light of the entire federal statutory framework, the Arizona requirement, applicable to all employers, is barred by principles of implied conflict preemption (which, of course, do not limit the broad authority over federal contracting *expressly* granted the President by another federal statute). Cf. *Chamber of Commerce* v. *Brown*, 128 S. Ct. 2408, 2418 (2008) (state requirement not saved from preemption merely because federal government imposes analogous, but narrower, requirement).

supra), always with a sunset provision; the program is currently scheduled to expire in 2012 unless further reauthorized. And Congress has never changed the program's expressly voluntary character, although many proposals to make the program mandatory have been introduced. See Pet. Br. 10 n.7. That limitation does not detract from E-Verify's successful track record, which is borne out by findings documenting the system's accuracy and participants' satisfaction.[11] The government continues to encourage more employers to participate. But under the statute as written, the States may not require statewide participation.

The court of appeals relied on the 2003 reauthorization, in which Congress decided to require that voluntary participation be available to employers nationwide. See 2003 Act § 3(a), 117 Stat. 1944 (amending IIRIRA § 401(c)(1)). That reasoning was erroneous. Congress undertook that expansion at a time when it had reservations about mandatory participation; the 2003 expansion, therefore, does not reflect a judgment that any and every measure increasing participation in E-Verify would be appropriate. Nor has Congress since changed the statute in any way, except to extend the program's duration.

In the 2003 legislation to expand E-Verify, Congress made no change to the provisions specifying that employers "may" elect to participate, "may" elect to participate on a limited basis, and "may terminate" their participation. IIRIRA § 402(a), (c)(2) and (c)(3). And Congress noted that a congressionally mandated report on the then-existing Basic Pilot Program's efficacy (see IIRIRA

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[11] See, *e.g.*, Westat, *Findings of the E-Verify Program Evaluation* at xxxi, xxxv-xxxvi (Dec. 2009), http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf (*E-Verify 2009 Report*).

§ 405(a)) had identified "problems," and it directed that the Secretary of Homeland Security further report on whether those problems had been resolved "before undertaking the expansion of the basic pilot program to all 50 States." 2003 Act § 3(b)(2), 117 Stat. 1945 (adding IIRIRA § 405(b)).

The report to which the 2003 Act referred and the history of that legislation confirm that Congress continued to contemplate voluntary participation. Several members of the House Judiciary Committee objected to requiring that E-Verify be available nationwide and contended that the congressionally mandated study supported their position. In response, the proponents of nationwide availability repeatedly emphasized the program's voluntary nature: "What we're talking about here is not a mandatory program, but an expansion of a voluntary program." H.R. Rep. No. 304, 108th Cong., 1st Sess, Pt. 1, at 28 (2003) (Rep. Hostettler); see also *ibid.* (Rep. King of Iowa); *id.* at 31 (Rep. Cannon). The sponsors acknowledged that according to the congressionally mandated study, "expanding [E-Verify] *on a mandatory basis would not be appropriate*" at that time. *Id.* at 29 (Rep. Hostettler) (emphasis added). But, the proponents noted, the study had concluded that the responsible federal agencies could successfully handle a nationwide program "of limited scope," *i.e.*, on a voluntary basis. *Id.* at 28. See generally Institute for Survey Research & Westat, *INS Basic Pilot Evaluation: Summary Report* 41 (Jan. 29, 2002) ("Based on the evaluation findings, the Basic Pilot program should not be expanded to a manda-

tory or large-scale program.") (boldface and italics omitted).[12]

As Congress contemplated, see § 405(b), DHS's consistent work since 2003 to improve the program has resolved many of the concerns previously identified.[13] Congress, however, has not amended the authorizing statute to alter the voluntary nature of participation.

3. Arizona's requirement to participate in E-Verify conflicts with the federal framework

The court of appeals thought that because Congress has expanded E-Verify in "duration and * * * availability," no federal policy would be frustrated if the States were to *mandate* participation. Pet. App. 21a. That reasoning misapprehends the balance that Congress struck in reauthorizing E-Verify, a balance in which voluntary participation is an essential element.

As the foregoing discussion shows, Congress's approach to E-Verify has never been "the more participation, and the sooner, the better." Cf. *Geier*, 529 U.S. at 874 (state tort-law duty requiring the immediate and universal installation of airbags was preempted, because although the responsible agency approved and favored airbags, it had rejected a policy of "the more airbags, and the sooner, the better," in favor of a more measured phase-in approach). Rather, Congress's steps to renew and expand the program have maintained E-Verify's voluntary character and have been incremental, within care-

[12] Debate on the substantially similar Senate bill ultimately adopted, which delayed the required nationwide availability for a year, similarly emphasized that the program was "in no way mandatory." 149 Cong. Rec. 29,763 (2003) (Rep. Calvert); see *id.* at 29,761-29,764 (Reps. Sensenbrenner, Jackson-Lee, Smith of Texas, Osborne) (noting participation was voluntary).

[13] See, *e.g.*, *E-Verify 2009 Report* at xxxii, xxxv, 57-61.

ful limits. Permitting the States to require *all* employers to participate would upset the balance that Congress struck.

The court of appeals further erred in suggesting (Pet. App. 20a) that congressional silence could be read as permission for the States to require private employers to enter into contracts *with the federal government*, pursuant to which federal agencies commit to provide the employer with certain services. See *The E-Verify Program for Employment Verification Memorandum of Understanding* 1-3, http://www.uscis.gov/files/nativedocuments/MOU.pdf (Oct. 29, 2008) (formal agreement between DHS and each participating employer). In many instances participation requirements imposed by state or local governments may overload otherwise elective federal programs and thus frustrate Congress's intent—although DHS advises in this case that the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create. But the court of appeals did not rely on any such practical considerations specific to E-Verify, and the *general* interpretive principle should be that, absent a clearer indication than present here, federal statutes of this kind should not be understood to allow States to impose such burdens on federal programs. "[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Buckman*, 531 U.S. at 347.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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