Supreme Court of the United States.
CHAMBER OF **COMMERCE** OF THE UNITED STATES OF AMERICA et al., Petitioners,
v.
Criss **CANDELARIA** et al., Respondents.
No. 09-115.
August 27, 2009.

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

Brief of Business Organizations as Amici Curiae in Support of Petitioners

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***1** *Amici curiae* respectfully submit this brief in support of petitioners.[FN1]

FN1. Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties received timely notice of *amici*'s intent to file this brief; all parties have consented to its filing, and letters reflecting their consent have been filed with the Clerk.

INTEREST OF AMICI CURIAE

Amici curiae file this brief to inform the Court of the significance of this issue to businesses, large and small, in many industries. As representatives of the business community, *amici* emphasize the substantial burdens imposed on businesses by the Legal Arizona Workers Act and scores of varying laws recently enacted in other jurisdictions.

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. ABC also has 78 chapters throughout the United States.

The Human Resource Initiative for a Legal Workforce (“HR Initiative”) represents the views of human resource professionals in thousands of small and large U.S. employers representing every sector of the U.S. economy. HR Initiative members (the American***2** Council on International Personnel, HR Policy Association, International Public Management Association for Human Resources, National Association of Manufacturers, and the Society for Human Resources Management) represent the front lines on employment verification and, as such, are fully committed to hiring only work-authorized individuals.

The U.S. Hispanic **Chamber** of **Commerce** (“USHCC”) is the nation's largest business chamber that focuses on the needs and issues of Hispanic-owned businesses, employees and consumers. USHCC's membership includes companies and professional organizations of every size, in every industry sector, and from every region of the United States and Puerto Rico. It also serves as an umbrella organization for local, regional and statewide Hispanic chambers in the United States, Puerto Rico, Canada, Mexico, and South America.

The **Chambers** of **Commerce** of Illinois, Indiana, Kansas, Kentucky, New Jersey, and West Virginia; the Missouri **Chamber** of **Commerce** and Industry; the State Chamber of Oklahoma; the Pennsylvania Chamber of Business and Industry; the Tennessee **Chamber** of **Commerce** and Industry; the Texas Association of Business; and the Association of Washington Business are statewide organizations that are composed of and represent the interest of businesses, both large and small, as well as local **chambers** of **commerce** and other interested parties.

A brief initial word about the immigration debate underlying this case is in order. *Amici* steadfastly oppose the

knowing employment of illegal immigrants.***3** It is against federal law knowingly to employ illegal workers, and employers who violate this law are subject to an extensive (and exclusive) federal system of administration, adjudication, and penalty. The efficacy and wisdom of that choice, made by Congress more than 20 years ago, is not at issue here. The question presented by the petition in this case instead is whether Arizona and other states and localities may make a different choice than Congress. They may not.

INTRODUCTION AND SUMMARY

In the Immigration Reform and Control Act of 1986, Congress established a uniform and comprehensive national framework governing employment verification for immigrants. Congress sought to balance the objective of preventing employment of illegal aliens with other goals, including avoiding discrimination and limiting burdens on employees and employers. The existence of a single nationwide system of employment verification substantially reduces the costs of compliance for employers.

The Legal Arizona Workers Act frustrates Congress's objective of establishing a uniform framework that limits the imposition of unnecessary compliance and administrative costs on employers. It requires employers in the State to use a particular employment verification program, E-Verify, that Congress decided should be voluntary, not mandatory. Congress has repeatedly declined to mandate the use of E-Verify, and with good reason. E-Verify is inaccurate, costly and burdensome for employers, and often leads to extensive delays before legal employees can begin working.

***4** In addition to mandating the use of E-Verify, Arizona's law imposes still further costs on businesses by imposing penalties on certain employers beyond those prescribed by federal law, and using its own adjudication system to determine whether employers have hired unauthorized workers. Those penalties include the forfeiture of a business license, which can be fatal to an employer.

The severe costs and burdens occasioned by Arizona's law are exacerbated by the patchwork of overlapping and contradictory laws enacted in other jurisdictions. States and municipalities have enacted scores of laws and ordinances regulating all aspects of employment verification. Some, like the Arizona law, mandate the use of E-Verify for some or all employers. Others purport to modify the requirements of the federal I-9 document verification program. Others create new adjudication schemes and standards, which depart from the system Congress enacted and impose harsh forms of civil and criminal sanctions on employers.

Each of these laws by itself imposes substantial costs on businesses that desire in good faith to comply with all applicable standards. Collectively, they impose an enormous financial and administrative burden on multi-state businesses, which must develop and maintain multiple, distinct compliance regimes throughout their fields of operation. This patchwork of state and local laws undermines Congress's intent to establish a comprehensive and uniform national framework that limits the imposition of undue burdens on businesses.

***5** ARGUMENT

Over twenty years ago, Congress recognized that the employment of illegal aliens was a national problem requiring a national solution. In response, Congress enacted the Immigration Reform and Control Act of 1986 ("IRCA") to create a uniform and comprehensive national employment verification framework. *See* Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. §§ 1324a, 1324b). The IRCA, as amended through subsequent statutes, *e.g.*, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, establishes a "comprehensive scheme prohibiting the employment of illeg-

al aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

Congress fashioned this "comprehensive scheme" in a manner sensitive to several competing considerations. *See Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991) (observing that the statute represents "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected"). In particular, Congress established a nationwide system that would be "least disruptive to the American businessman." H.R. Rep. No. 99-628, pt. 1, at 56 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5660. Congress's sensitivity to the burden on employers pervaded its deliberations. *See Collins Food Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) ("[T]he legislative history of section 1324a indicates that Congress intended to minimize ***6** the burden and the risk placed on the employer in the verification process."). Congress accordingly required the GAO to prepare a report to determine whether "an unnecessary regulatory burden has been created for employers," IRCA § 101(j), and established a joint taskforce to review this and other reports and make follow-up recommendations, *id.* § 101(k). As a result of Congress's concern for the interests of businesses, it ultimately adopted a framework that is "fair to decent and honest employers, but at the same time, ensure[s] that repeat offenders will be subject to strong civil and criminal penalties." 132 Cong. Rec. H10,584 (daily ed. Oct. 15, 1986) (statement of Rep. Rodino).

The Legal Arizona Workers Act interferes with Congress's establishment of a comprehensive and uniform employment verification framework. Contrary to Congress's wishes, Arizona's law places substantial costs on businesses through mandating use of the E-Verify program - which Congress deliberately specified should be voluntary - and imposing additional sanctions above those permitted by federal law. The burdens imposed on businesses are magnified many times over by a patchwork of new immigration provisions enacted by states and municipalities in recent years. The competing and inconsistent requirements undermine Congress's intent to establish a uniform comprehensive framework that would be "least disruptive" to American businesses.

***7** I. THE ARIZONA STATUTE SUBJECTS BUSINESSES TO BURDENSOME REQUIREMENTS AND UNDULY HARSH SANCTIONS

The Arizona law requires "every employer" in the state to use E-Verify, a flawed and burdensome electronic employee verification program. *See* Ariz. Rev. Stat. § 23-214(A). Congress created E-Verify (then known as the "Basic Pilot Program") as one of three voluntary and experimental employment verification programs to supplement the standard federal I-9 document verification system. *See* 8 U.S.C. § 1324a note. From the outset, Congress prescribed that employer participation in E-Verify be strictly voluntary. *See* IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, § 402(a) (1996) ("the Attorney General *may not require* any person or other entity to participate in" E-Verify) (emphasis added); *see also id.* § 402(d)(2), (3)(A) (repeatedly noting the "voluntary nature" of the program). Moreover, as Congress has continued to study E-Verify, it has repeatedly declined to enact legislation that would require private employers to use the program. *See, e.g.*, H.R. 98, 110th Cong. § 5(a) (2007); H.R. 1951, 110th Cong. § 3 (2007); *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse, Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (June 10, 2008).[FN2] Congress has kept E-Verify strictly voluntary***8** for good reason: the program yields inaccurate results and imposes significant burdens.

> FN2. Certain federal agencies recently promulgated a regulation mandating the use of E-Verify by certain federal contractors and sub-contractors. Federal Acquisition Regulation, 73 Fed. Reg. 67,651 (Nov.

14, 2008) (to be codified at 48 C.F.R. pts. 2, 22, 52). The rule, however, does not require the use of E-Verify for private employers other than those contracting with the federal government, nor does it authorize states to require E-Verify in any circumstances. Indeed, the rule's narrow application only underscores that E-Verify is voluntary except where explicitly made mandatory. And in any event, the lawfulness of that limited regulation is currently being challenged. *See* ***Chamber*** *of* ***Commerce*** *v. Napolitano*, No. 8:08-cv-3444 (D. Md. filed Dec. 23, 2008).

1. Employers who participate in E-Verify must use the Internet to check their employees against a federal database of presumably valid Social Security numbers. *See* Expansion of the Basic Pilot Program, 69 Fed. Reg. 75,997, 75,998 (Dec. 20, 2004); E-Verify Memorandum of Understanding ("MOU"), *available at* http://www.uscis.gov/files/nativedocuments/MOU.pdf. Many employees cannot be immediately confirmed as work-authorized because the information their employer enters into the system fails to match records contained in the federal database. *See Employment Verification - Challenges Exist in Implementing a Mandatory Electronic Employment Verification System: Hearing Before the Subcomm. on Social Security, H. Comm. on Ways & Means*, 110th Cong. 4 (2008) (statement of Richard M. Stana, Government Accountability Office) ("GAO Testimony"); *see also* E-Verify Statistics, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66fXXX-XX-XXXXf6d1a/?vgnextoid=f82d8557a487a110VgnVCM1000004718190aRCRD&vgnextchannel=a16988e60a405110VgnVCM1000004718190aRCRD. For any employee whom the database - ***9** and, in the case of non-citizens, an immigration official - fails to clear, E-Verify provides a "tentative" nonconfirmation of work authorization status.

Many U.S. citizens and other authorized employees are the subject of a tentative nonconfirmation for a variety of reasons, including mistakes on the Form I-9 by the employer or employee, inaccurate data entry by the employer, or - as in the majority of cases - outdated government records due to a legal change of the employee's name, citizenship status, or other identifying information. Pilot Programs for Employment Eligibility Confirmation, 62 Fed. Reg. 48,309, 48,312 (Sept. 15, 1997); *see also* GAO Testimony, *supra*, at 4. Such mistakes are commonplace. Indeed, the Social Security Administration ("SSA") itself has acknowledged that its "Numident" file - the database on which E-Verify principally relies - contains inaccuracies that could result in the communication of incorrect work authorization information to employers on a widespread scale. *See* Office of the Inspector General, Social Security Administration, *Congressional Response Report: Accuracy of The Social Security Administration's Numident File* ii (2006), *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf. After reviewing a sample of 2,430 Numident records and finding 136 that contained errors, for example, the agency estimated that 4.1 percent of its file - or 17.8 *million* records - could result in "incorrect feedback" when submitted through E-Verify. *Id.*

Even the Department of Homeland Security ("DHS"), which administers the program, has recognized E-Verify's serious flaws. A recent study commissioned by the Department found that "the database***10** used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification." *See* Westat, *Findings of the Web Basic Pilot Evaluation* xxi (2007), *available at* http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf. And while SSA and DHS can conduct a manual review to determine whether a particular tentative nonconfirmation is erroneous, that process is time-consuming and can lead to discrimination against foreign-born, work-authorized employees. *Id.* The DHS-commissioned study thus concluded that "improvements are needed" before E-Verify can become "a mandated national program." *Id.*

The error rate is particularly acute for foreign-born employees. Because SSA does not automatically update the

citizenship status of aliens who become naturalized citizens, as many as 3.3 *million* non-U.S. citizen records contain out-of-date citizenship status information, a significant problem that has caused the agency itself to express concern about "the extent of incorrect citizenship information" in the Numident file. *See* Office of the Inspector General, *Congressional Response Report*, *supra*, at ii. Because E-Verify relies on government databases including the SSA's, naturalized, work-authorized citizens with outdated SSA files may receive a temporary nonconfirmation, requiring them to contact the United States Citizenship and Immigration Services ("USCIS") or travel to an SSA field office to correct their records. *See* GAO Testimony, *supra*, at 13; *see also* E-Verify Statistics, *supra*. In the end, foreign-born, work-authorized employees - whether naturalized citizens or work-authorized noncitizens - are 30 times more likely to receive an erroneous***11** tentative nonconfirmation than someone born in the United States. *See* Westat, *Findings of the Web Basic Pilot Evaluation*, *supra*, at xv.

2. E-Verify's significant error rate places substantial burdens on participating employers and their employees - burdens that will only increase as a result of statutes, like Arizona's, that make the program mandatory. E-Verify's rules prohibit an employer from taking adverse action against an employee who receives a tentative nonconfirm result for eight to ten days, in order to allow the employee to contest the results with the federal government. *See* Pilot Programs, 62 Fed. Reg. at 48,312. The employer must further suspend action during a subsequent period "while SSA or [DHS] is processing the verification request," MOU at ¶¶ II.C.10, and the average length of time for resolving these challenges ranges from 19 to 74 days, *see* Westat, *Findings of the Web Basic Pilot Evaluation*, *supra*, at 78-79. Throughout that period, "the employer may not terminate or take adverse action against the employee based upon his or her employment eligibility status." Pilot Programs, 62 Fed. Reg. at 48,312. The employer cannot even withhold training from the employee. E-Verify thus injects considerable uncertainty and delay into employers' investments in hiring and training new employees. *See* Westat, *Findings of the Web Basic Pilot Evaluation*, *supra*, at 68. And employers incur significant costs as a result of employees' travelling to SSA field offices in an attempt to resolve errors. *Id.* at 78-79.

Employers have identified a litany of other problems with E-Verify. These include technical pitfalls such as system unavailability, difficulty accessing ***12** the system, and failure of passwords to function. *Id.* at xxii, 66. More systemic problems also exist. For example, employers have complained about their interactions with SSA and USCIS, observing that local agency representatives made mistakes and were unresponsive and unfamiliar with E-Verify. *Id.* at 66. Employers also must spend extra time on paperwork required by the program and travel long distances to SSA field offices, and have difficulty meeting the program's tight deadlines. *Id.* at 68. Even when it operates without flaws, E-Verify takes a financial toll on businesses, who must acquire, set up, and maintain computer systems, and train personnel in the program. *Id.* at 104-06. Those problems place a special burden on small businesses, who lack the means adequately to staff and maintain the program, and who find themselves at risk of noncompliance and the resulting substantial penalties.

Given these burdens, it is hardly surprising that most employers have declined to volunteer to use E-Verify. *Id.* at xxi.

3. The Arizona statute also establishes an independent, state proscription against hiring unauthorized aliens, which it enforces with sanctions that go beyond those authorized by federal law. *See* Ariz. Rev. Stat. § 23-212. Like its mandated use of E-Verify, the Act's punitive enforcement scheme places significant burdens on businesses.

The consequences of a violation are severe. An employer's first violation is punished by the imposition of a mandatory probationary period, during which the business must comply with additional reporting requirements

for each new employee it hires; ***13** the state court may also order the suspension, for a ten-day period, of the employer's "licenses" - which the Act defines broadly to include charters, articles of incorporation, and other foundational documents. *Id.* §§ 23-212(F)(1), 23-211(9). The penalty for a second violation is the permanent and immediate revocation of the employer's business licenses, at the location where the unauthorized alien worked or - if the employer has no license specific to that location - at the employer's primary place of business. *Id.* § 23-212(F)(2). The practical effect of that punitive sanction, deemed the "business death penalty" by Arizona's then-governor, *see* Pet. at 9, is to end the very existence of some businesses.

II. THE PATCHWORK OF STATE AND LOCAL IMMIGRATION LAWS IS BURDENSOME AND COSTLY FOR BUSINESS

Arizona's law is but one example of a growing multitude of similar efforts by States and localities to establish their own rules governing verification of immigrants' employment eligibility. States and cities have modified the federal electronic or document verification requirements, developed their own adjudication and enforcement mechanisms, and imposed their own sanctions and penalties. Each one of these laws places concrete burdens on businesses that operate in the jurisdiction. Taken together, the patchwork of conflicting and costly standards and requirements threatens to overwhelm multi-state businesses.

1. a. In recent years, state legislatures have enacted a growing deluge of laws regulating various aspects of immigration. The National Conference of ***14** State Legislatures ("NCSL") has prepared yearly reports collecting and cataloguing the laws:

- In 2005, 300 immigration-related bills were introduced and 38 laws were enacted.
- In 2006, activity doubled: 570 bills were introduced and 84 laws were enacted.
- In 2007, activity tripled: 1,562 bills were introduced and 240 laws were enacted.
- In 2008, activity remained at this high level: 1305 bills were considered and 206 were enacted.
- In the *first half* of 2009 alone, "state legislation related to immigration topped last year's totals": more than 1400 bills have been considered in all 50 states; at least 144 laws have been enacted in 44 states; 285 bills and resolutions have passed legislatures; and 23 bills are pending Governor's approval.

NCSL 2009 Report[FN3] at 1.

> FN3. NCSL Immigrant Policy Project, State Laws Related to Immigrants and Immigration, January 1 - June 30, 2009 (July 17, 2009), *available at* http://www.ncsl.org/documents/immig/ImmigrationReport2009.pdf.

These laws cover a number of topics, ranging from law enforcement to identification to education and benefits. But in each of these recent years, laws regulating employment of immigrants number among the most frequently introduced and enacted. *See, e.g.*, NCSL 2008 Report[FN4] at 1 (stating that "[a]s ***15** in recent years, the top three areas of interest are identification/driver's licenses, employment and law enforcement"). Thus, according the NCSL, 244 employer-related immigration bills were introduced in 45 states in 2007, and 20 states enacted legislation. NCSL 2007 Report[FN5] at 2, 7-10. In 2008, 13 states enacted 19 more employer-related immigration laws. NCSL 2008 Report, *supra*, at 5-8. And in the first half of 2009, ten laws were enacted in seven states, and four additional laws are pending before state governors. *See* NCSL 2009 Report, *supra*, at 3-4. Those totals do not even include municipal ordinances and resolutions.

> FN4. NSCL Immigrant Policy Project, State Laws Related to Immigrants and Immigration in 2008 (rev. Jan. 27, 2009), *available at* http://

www.ncsl.org/Portals/1/documents/immig/StateImmigReportFinal2008.pdf.

FN5. NCSL Immigrant Policy Project, 2007 Enacted State Legislation Related to Immigrants and Immigration (rev. Jan. 31, 2008), *available at* http:// www.ncsl.org/print/immig/2007Immigrationfinal.pdf.

b. This patchwork of immigration employment laws, which impose a variety of requirements inconsistent with those authorized by Congress, defies easy categorization. This is all the more reason that the Court's review is important; the different nature of these mandates, as much as their increasing prevalence, imposes just the sort of costly compliance burdens that Congress intended to prevent when it implemented a national system. These include:

* *Requiring certain employers to use E-Verify.* As explained above, Arizona's law explicitly requires employers to use E-Verify, even though Congress deliberately made the program voluntary. A number of other States and local jurisdictions have enacted ***16** provisions that likewise govern employers' use of E-Verify. Mississippi also explicitly requires employers to use the program.[FN6] Colorado, Minnesota, Missouri, Georgia, Rhode Island, and certain municipalities explicitly or effectively require state contractors to participate in the program.[FN7] Other states, including Oklahoma and Utah, require certain employers to use a state-created employment verification system.[FN8] Illinois, in direct contrast, forbade employers in the state from using E-Verify, *see* 820 Ill. Comp. Stat. 55/12, but a court has since held that federal law preempted that ban, *see United States v. Illinois*, No. 07-3261, 2009 WL 662703 (C.D. Ill. Mar. 12, 2009).

FN6. Miss. S.B. 2988 § 2(3)(d), 2(4)(b)(i), Reg. Session (2008).

FN7. *See* Colo. Rev. Stat. §§ 8-17.5-101(3.3), 8-17.5-102(1), (5)(c)(I) - (III); Minn. Exec. Order 08-01 (Jan. 7, 2008); Mo. Rev. Stat. §§ 285.525(6), 285.530(2); Ga. Code Ann. § 13-10-91(b); R.I. Exec. Order 08-01 (Mar. 27, 2008); S.C.H.B. 4400 §§ 3, 19 (codified at S.C. Code Ann. §§ 41-8-20(B)(1), 8-14-10(A)(4), 8-14-20(B)(1)); Ordinance No. 2006-18 § 4(D) (Hazelton, Pa.); Ordinance No. 2006-005 § 4(D) (Bridgeport, Pa.); Ordinance No. 1736 § 4(D) (Valley Park, Mo.); Resolution No. 2006-R-106 (Cherokee County, Ga.); Ordinance No. 07-02 § 23.D.13 (Dorchester County, S.C.); Ordinance No. 07-260 (Mission Viejo, Cal.).

FN8. Utah Code Ann. § 63G-11-103(1)(c), (3)(a); Okla. Stat. tit. 25, §§ 1312, 1313(B)(2).

* *Overriding the federal I-9 document verification system.* Still other jurisdictions effectively override the federal I-9 document verification system by altering the numbers and types of documents required, or the scope of employees covered. Tennessee and Louisiana regulate the number and types of documents***17** employers can use to verify work authorization status.[FN9] Georgia and South Carolina impose special tax withholding requirements on employers who fail to collect additional information from employees beyond that required in the federal I-9 employment verification process.[FN10] South Carolina requires some private businesses who do not use E-Verify to hire only those employees who meet the state's driver license eligibility requirements. 2008 S.C. Laws Act 280 (H.B. 4400) § 19 (codified at S.C. Code Ann. § 41-8-20(B)(2)(b) - (c), (C)). And Oklahoma's law effectively requires an employer to verify the employment eligibility of a non-employee independent contractor, Okla. Stat. tit. 68, § 2385.32, even though federal law excludes contractors from the I-9 process, *see* 8 C.F.R. § 274a.1(f) - (g)). Hazleton, Pennsylvania likewise attempted to require document verification for independent contractors. *See Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 526 (M.D. Pa. 2007).

FN9. Tenn. Code Ann. § 50-1-106; La. Rev. Stat. Ann. § 23:992.2.

FN10. Ga. Code Ann. § 48-7-101(i); S.C.H.B. 4400 § 8 (codified at S.C. Code Ann. § 12-8-595(A) - (B)).

* *Authorizing state officials to adjudicate employer compliance under altered standards.* In addition to imposing document or electronic verification requirements on employers that depart from those prescribed by federal law, some recently enacted statutes instruct state officials to make their own independent evaluations about an employer's compliance. The challenged Arizona law allows a *state* judge to determine whether employers have violated ***18** the hiring prohibition. Ariz. Rev. Stat. § 23-212(A). Oklahoma subjects employers to the state administrative machinery that attends charges of discrimination. *See* Okla. Stat. tit. 25, § 1313(C). Those types of provisions conflict with the elaborate administrative review system enacted by Congress to determine whether an employer knowingly employed an illegal alien. *See* 8 U.S.C. § 1324a(e)(3); 28 C.F.R. pt. 68. Moreover, whereas the IRCA permits federal sanctions only if an employer "knowingly" hires an unauthorized alien, State and local laws have lowered the scienter requirement, sometimes permitting employers to be held liable based on a standard of mere "reckless [ness]"[FN11] or "negligence,"[FN12] or even strict liability.[FN13]

FN11. Miss. S.B. 2988 § 2(8)(c)(i).

FN12. Utah Code Ann. § 63G-11-103(4)(a)(i).

FN13. La. Rev. Stat. Ann. § 23:992; Ordinance No. 2006-18 § 4(A) (Hazelton, Pa.); Ordinance No. 2006-005 § 4(A) (Bridgeport, Pa.); Ordinance No. 07-02 § 23.C (Dorchester County, S.C.). Hazelton amended its ordinance after it was attacked in litigation. Ordinance No. 2007-6 (Hazelton, Pa.); *see Lozano*, 496 F. Supp. 2d at 484-85 & n.2. But strict liability regimes remain in force in Louisiana, Bridgeport, and Dorchester County.

* *Imposing additional penalties and sanctions.* A number of states impose a range of additional penalties on employers, beyond those authorized by federal law. Some jurisdictions allow civil and criminal penalties, including fines and even imprisonment, for employers they find to have hired illegal immi***19** grants.[FN14] Other states have created new types of legal liability for employers through the tort system. Oklahoma, for example, subjects employers to a discrimination claim on behalf of any discharged employee if the employer "reasonably should have known" that a retained employee is an unauthorized alien. Okla. Stat. tit. 25, § 1313(C). Louisiana, Mississippi, South Carolina, Utah, and certain municipalities have created similar tort claims.[FN15] Arizona, along with other states, punishes violations through suspension or revocation of a business's "licenses," including withdrawal of its charter.[FN16] And Colorado, Georgia, Missouri, and South Carolina bar businesses from deducting wages paid to known unauthorized workers as a business expense on state income tax forms.[FN17]

FN14. La. Rev. Stat. Ann. § 23:993; W. Va. Code § 21-1B-5; Local Law No. 52-2006 § 8 (Suffolk County, N.Y.).

FN15. La. Rev. Stat. Ann. § 23:994; Miss. S.B. 2988 § 2(4)(d); S.C.H.B. 4400 § 12 (codified at S.C. Code Ann. § 41-1-30); Utah Code Ann. § 63G-11-103(4); Ordinance No. 2006-18 § 4(E)(2) (Hazelton, Pa.); Ordinance No. 2006-005 § 4(E)(2) (Bridgeport, Pa.). Still additional jurisdictions threaten either direct or tort liability on businesses not using Basic Pilot. *See* Ga. Code Ann. § 48-7-21.1(b) - (c)(1); Miss. S.B. 2988 § 2(4)(d) - (e); S.C.H.B. 4400 §§ 12, 19 (codified at S.C. Code Ann. §§ 12-6-1175(B), (F) (tax), 41-1-30(A), (E) (tort), 41-8-20, -30, -40 (direct)); Utah Code Ann. § 63G-11-103(4)(a) - (b); Ordinance No. 07-02 §§ 23.C, 23.D.5 (Dorchester County, S.C.).

FN16. *See* Ariz. Rev. Stat. § 23-212; *see also, e.g.*, Miss. Code Ann. 71-11-3(7)(e); Mo. Rev. Stat. §§ 285.525, 285.530; W. Va. Code § 21-1B-7.

FN17. Colo. Rev. Stat. § 39-22-529(2); Ga. Code Ann. § 48-721.1(b); Mo. Rev. Stat. § 285.535(14); S.C. Code Ann. § 12-6-1175(B).

***20** That is a small sampling of the patchwork of immigration-related employer requirements recently enacted by States and municipalities, whose validity is ultimately at issue here.

2. The rash of new laws places significant administrative, compliance, and punitive costs on businesses. To begin with, the patchwork of laws causes considerable confusion for employers and employees alike. It is difficult enough for businesses to stay informed of the steady flow of new legal requirements, let alone to develop compliance programs that keep pace with the unpredictable and ever-changing legal landscape. Moreover, the range of distinct verification regimes in different jurisdictions imposes substantial administrative costs on businesses, particularly on human resources and legal offices. At a minimum, businesses must devote significant resources simply to monitor, understand, and attempt to comply with these laws. And when businesses are unable to adapt their verification systems to a new law in any given state, they face harsh sanctions and penalties, even if they remain in full compliance with federal law. Of course, employers all the while must abide by the IRCA and its implementing regulations.

The Court should consider the petition in the context of the full range of state and local regulations. Permitting Arizona's law to remain standing would also leave in place numerous provisions enacted by other States and localities as well, and, indeed, could encourage other jurisdictions to enact still further employment verification regulations. The cumulative effect of all of those laws strongly counsels in favor of granting the petition.

***21** Indeed, this Court has emphasized the need to maintain that sort of global perspective in the area of preemption. In *Rowe v. New Hampshire Motor Transport Ass'n*, the Court held that Maine's effort to establish rules affecting the shipment of tobacco products in the State was preempted by federal law (the Federal Aviation Administration Authorization Act of 1994). 128 S. Ct. 989 (2008). In finding the law preempted, the Court explained that "allow[ing] Maine to insist that the carriers provide a special checking system would allow other States to do the same." *Id.* at 996. And a decision that "federal law … permit[s] these, and similar, state requirements could easily lead to a patchwork of state … laws, rules, and regulations." *Id.* In *Rowe*, the Court considered "[t]hat state regulatory patchwork [to be] inconsistent with Congress' major legislative effort …." *Id.; see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (considering the consequences of "50 States' tort regimes"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (considering the "prospect" of action by "all 50 States").

Here, likewise, the Court should approach the petition in this case with the understanding that denying review of Arizona's law "could easily lead to a patchwork of state" and local laws. That "regulatory patchwork" has already become a reality, one that places significant and growing burdens and penalties on businesses that endeavor in good faith to comply with federal law.

***22** CONCLUSION

The Court should grant the petition for a writ of certiorari.

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