No. 09-

IN THE

Supreme Court of the United States

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

v.

CRISS CANDELARIA *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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

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

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

July 24, 2009 * Counsel of Record

[Additional Counsel Listed Inside]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

DAVID A. SELDEN
JULIE A. PACE
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
3300 N. Central Avenue
Suite 1800
Phoenix, AZ 85012
(602) 798-5472

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

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

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

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

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

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

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

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

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

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

Counsel for Petitioner
Wake Up Arizona! Inc.

QUESTIONS PRESENTED

1. Whether an Arizona statute that imposes sanctions on employers who hire unauthorized aliens is invalid under a federal statute that 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).

2. Whether the Arizona statute, which requires all employers to participate in a federal electronic employment verification system, is preempted by a federal law that specifically makes that system voluntary. 8 U.S.C. § 1324a note.

3. Whether the Arizona statute is impliedly preempted because it undermines the "comprehensive scheme" that Congress created to regulate the employment of aliens. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002).

PARTIES TO THE PROCEEDING

Petitioners which were plaintiffs/appellants below are Chamber of Commerce of the United States of America; Arizona Contractors Association; Arizona Chamber of Commerce; Arizona Employers for Immigration Reform; Arizona Farm Bureau Federation; Arizona Hispanic Chamber of Commerce; Arizona Landscape Contractors Association; Arizona Restaurant and Hospitality Association; Arizona Roofing Contractors Association; Associated Minority Contractors of America; Chicanos Por La Causa; Somos America; Valle Del Sol, Inc.; National Roofing Contractors Association; and Wake Up Arizona! Inc.

Respondents who were defendants/appellees below are Criss Candelaria; Kenny Angle; Melvin R. Bowers Jr.; Martin Brannan; James Currier; Daisy Flores; Fidelis V. Garcia; Gale Garriott; Terry Goddard; Terrence Haner; Barbara Lawall; Janet Napolitano; Sheila Polk; Derek D. Rapier; Ed Rheinheimer; George Silva; Jon Smith; Matthew J. Smith; Andrew P. Thomas; and James P. Walsh.

There are no parent corporations or publicly held corporations that own 10% or more of the stock of any of Petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are business, community-based, and civil rights organizations that hereby petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the United States District Court for the District of Arizona are published at 534 F. Supp. 2d 1036 and 526 F. Supp. 2d 968, and are reproduced at Pet. App. 49a-94a, 95a-126a. The opinion of the Ninth Circuit, which was captioned *Chicanos Por La Causa* v. *Napolitano*, is published at 544 F.3d 976, and reproduced at Pet. App. 26a-48a. The Ninth Circuit's order amending its opinion, and denying rehearing and rehearing en banc, is published at 558 F.3d 856, and reproduced at Pet. App. 1a-25a.

JURISDICTION

The Ninth Circuit entered judgment on September 17, 2008. A timely petition for rehearing and rehearing en banc was denied on March 9, 2009. On June 2, 2009, Justice Kennedy granted an extension of time to and including July 24, 2009, to file a petition for a writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The Supremacy Clause of the United States Constitution provides, in pertinent part, that "the Laws of the United States ... shall be the supreme Law of the

Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

Relevant provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, codified at 8 U.S.C. § 1324a, are reproduced at Pet. App. 127a-47a. Relevant provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, are set forth in a note to 8 U.S.C. § 1324a, and are reproduced at Pet. App. 147a-68a.

Relevant provisions of the Legal Arizona Workers Act, Ariz. Rev. Stat. §§ 23-211 to 23-216, are reproduced at Pet. App. 169a-92a.

INTRODUCTION

This case involves a question of exceptional national importance: whether state legislatures and municipal governments may override Congress's judgment concerning United States immigration policy. Plainly they may not. This Court has made clear that federal law creates a "comprehensive scheme" for regulating the employment of aliens and the verification of immigration status. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002). And, with one tightly circumscribed exception, IRCA expressly preempts state laws that would regulate in this field. 8 U.S.C. § 1324a(h)(2).

In contravention of these clear directives, state legislatures and municipal governments across the country are seeking to regulate the employment of aliens. In the first three months of 2009 alone, over 1,000 immigration-related bills and resolutions were introduced, in all 50 states. At least 150 of these bills related specifically to employment, and 40 such bills

have been enacted in 28 states since 2007.[1] The result is a "cacophony" of state immigration laws,[2] which are disrupting the congressional plan to comprehensively and "uniformly" regulate status verification and employment of immigrants. IRCA § 115, 100 Stat. at 3384. During the presidential campaign, then-Senator Obama properly described these statutes as "unconstitutional and unworkable," noting that they "underscore[] the need for comprehensive immigration reform so local communities do not continue to take matters into their own hands."[3]

At issue here is the "Legal Arizona Workers Act." Pertinent here, this statute imposes sanctions on employers that knowingly hire unauthorized workers, and requires all Arizona employers to use "E-Verify," a federally administered electronic employment verification system (which formerly was known as the "Basic Pilot Program"). In the decision below, the Ninth Circuit held that these provisions are not preempted, notwithstanding that IRCA expressly prohibits states from regulating the employment of aliens, see 8 U.S.C § 1324a(h)(2), and notwithstanding that IIRIRA explicitly provides that the use of E-Verify is voluntary, see IIRIRA § 402. It did so by transforming the narrow savings clause in the statute's preemption provision for "licensing and similar laws"

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[1] *See* Nat'l Conf. of State Legislatures, *2009 Immigration-Related Bills and Resolutions in the States* (Apr. 22, 2009), *at* http://www.ncsl.org/documents/immig/2009ImmigFinalApril222009.pdf.

[2] *See* Pew Research Ctr., *State of the States Report–2008* at 56-62, *available at* http://archive.stateline.org/flash-data/StateOfTheStates2008.pdf.

[3] Stephen Dinan, *Judge Overturns Hazleton's Law Targeting Illegals*, The Washington Times, July 27, 2007, at A05.

into a gaping loophole that would upend the system Congress enacted.

Review by this Court is appropriate now and in this case. Without immediate action by this Court, the crazy-quilt of state and local immigration statutes will continue to expand, multiplying burdens on employers and unfairness to employees. The result will be a flood of lawsuits, years of litigation, and an unnecessary waste of judicial, legislative, and executive resources. This case is a particularly good vehicle to address these issues, because it presents two questions—the scope of § 1324a's preemption provision and savings clause, and whether states may require the use of E-Verify—that are implicated by many of the state and local enactments and proposed legislation. The Arizona statute's reliance on a *state* determination of immigration status, in the absence of a prior *federal* adjudication, likewise is an important federal question implicating the scope of federal immigration statutes and regulations. And, the decision below threatens to undo Congress's careful and deliberate crafting of a "comprehensive scheme" regulating the employment of aliens. *Hoffman*, 535 U.S. at 147.

The severity of the broader national problem—and in particular the burdens on employers who must meet different and sometimes conflicting laws in numerous jurisdictions—is reflected in the broad coalition supporting this petition. Business, labor, and civil rights organizations, which only rarely see eye to eye, joined in challenging the statute below; support the petition here; and individually and collectively recognize the fundamental need for review and clarification of the law by this Court. The important missing voice, however, is that of the Executive Branch of the United States, which has a critical interest in en-

suring the integrity and uniformity of immigration laws, in regulating the employment of aliens, and in ensuring that the Legislative Branch's intent is not thwarted. It is the Executive Branch that administers the federal status verification systems at issue here, as well as the exclusive system for adjudicating violations of federal immigration law into which Arizona now would intrude. The Court should invite the views of the Solicitor General on these important national issues, and then grant certiorari to resolve them.

STATEMENT OF THE CASE

This case centers on the interplay between federal immigration law and the Legal Arizona Workers Act, which seeks to regulate employment eligibility and immigration status verification. It therefore is necessary to briefly explain the federal and state statutes implicated here.

I. STATUTORY AND REGULATORY BACKGROUND

This Court long has recognized that most questions involving immigration are regulated exclusively by the federal government. *Hines* v. *Davidowitz*, 312 U.S. 52, 60-62 (1941). One exception used to be the employment of aliens. Prior to 1986, it could fairly be said that federal law (in the form of the then-controlling Immigration and Nationality Act, ch. 447, 66 Stat. 163 (1952)) had only "a peripheral concern with employment of illegal entrants." *De Canas* v. *Bica*, 424 U.S. 351, 360 (1976). After 15 years of study, however, Congress changed course when it enacted IRCA in 1986. That statute constituted a "comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman*, 535 U.S. at 147.

IRCA makes it unlawful "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A). Violations of the statute are adjudicated before a federal administrative law judge in accordance with procedures dictated in detailed and lengthy statutory and regulatory provisions. See generally *id.* § 1324a(e); 28 C.F.R. pt. 68. These provisions specify civil and criminal sanctions for employers that violate IRCA, including graduated monetary penalties, civil injunctions, criminal fines (of up to $3,000 per unauthorized worker), and even imprisonment (of up to six months). 8 U.S.C. § 1324a(e)(4), (f); 8 C.F.R. § 274a.10(a), (b)(1)(ii)(A). The administrative law judge's decision is subject to administrative appellate review, and then to federal judicial review. 8 U.S.C. § 1324a(e)(7), (8).

To ensure compliance with the statute, Congress established a system for employers to verify employees' work eligibility. See 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). This system, known as the I-9 Form process, requires employers to collect documents establishing the employee's work authorization and identity, and then to complete a form (the federal I-9 Employment Eligibility Form) for submission upon request to federal officials. 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). An employer who in good faith complies with this process cannot be sanctioned, even if the employee later is determined to lack employment eligibility. 8 U.S.C. § 1324a(a)(3).

For a decade, the I-9 Form process served as the exclusive means for employers to verify employees' work authorization status. See *Hoffman*, 535 U.S. at 147-48. In 1996, Congress additionally established three test "pilot programs" for employment status verification. Relevant here, these included the Basic

Pilot Program (since rebranded "E-Verify" by the Department of Homeland Security). E-Verify is a method of electronic verification that an employer may use in addition to the I-9 system. See IIRIRA §§ 401-405. Under E-Verify, an employer who enters into an agreement with the federal government is granted access to Internet databases maintained by the government. An employer then can check the information in those databases against information submitted by prospective hires, and determine (tentatively) whether the employee is authorized to work. *Id.*

E-Verify is massive in scope and error-prone. It imposes substantial transaction and opportunity costs on businesses, and it was feared to lead to unlawful discrimination on the basis of national origin. Accordingly, Congress expressly made the program voluntary. IIRIRA § 402. The government "*may not require* any person or other entity to participate" in the program, *id.* (emphasis added), subject only to enumerated exceptions for certain departments of the federal government and congressional offices, *id.* § 402(e).[4]

Federal law also makes clear the primacy of federal authority in regulating the employment of aliens. IRCA expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ,

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[4] Federal regulation in this arena is evolving. A recently adopted federal regulation would make E-Verify mandatory for certain federal contractors and subcontractors. Federal Acquisition Regulation, 73 Fed. Reg. 67,651 (Nov. 14, 2008); *see Chamber of Commerce* v. *Chertoff*, No. 8:08-cv-3444 (D. Md. filed Dec. 23, 2008) (challenging the legality of the regulation). That regulation, however, does not broadly mandate the use of E-Verify, much less authorize states or localities to do so.

or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). And, Congress made clear that changes to the system regulating the employment of aliens would come incrementally, in order to permit careful study, rather than as the result of shifting political winds. IRCA therefore requires the Executive Branch to provide Congress with advance warning before making significant modifications to employment verification requirements. Specifically, the President must transmit to Congress detailed written reports of any proposed changes before those changes become effective, in some cases up to two years in advance. *Id.* § 1324a(d).

The notice requirement is not intended merely to put a leash on the Executive Branch. Rather, the deliberate process chosen by Congress reaffirms the careful fashion in which IRCA and IIRIRA balance between and among multiple considerations: deterring illegal immigration; preventing unauthorized employment; limiting burdens on employers; and recognizing the civil rights and interests of individuals seeking employment, as well as current employees. Congress calibrated that balance and dictated that the Executive Branch not recalibrate it without providing Congress ample notice and an opportunity to respond. 8 U.S.C. § 1324a(d). It is against this legislative and regulatory backdrop that states and localities have attempted to impose their own, different judgments about how to deal with the employment of aliens in the United States.

II. THE ARIZONA STATUTE

In 2007, Arizona enacted the Legal Arizona Workers Act. Its express purpose was to take on the role of immigration enforcement that was occupied by the federal government. In signing the legislation, then-Governor Janet Napolitano (now the Secretary of the

Department of Homeland Security) acknowledged that "[i]mmigration is a federal responsibility," but asserted that state regulation was necessary because, in her view, "Congress [is] incapable of coping with the comprehensive immigration reforms of our country's needs." Pls./Appellant's Excerpts of Rec. 287, No. 07-17272 (9th Cir. filed Mar. 31, 2008) ("ER").

The Act contradicts federal immigration policy in at least two important ways. *First*, it establishes an independent state prohibition on the hiring of unauthorized aliens, see Ariz. Rev. Stat. § 23-212(A), and imposes additional sanctions on employers who are found by a *state* judge to have violated that prohibition, *id.* § 23-212(F). These sanctions include the revocation or suspension of a company's "licenses," defined broadly to include articles of incorporation and other such foundational company documents. *Id.* §§ 23-211, 23-212. In short, a company found to have violated the new state immigration law could have its charter revoked and its very existence extinguished by the state. See *id.* Governor Napolitano accurately christened this draconian provision the "business death penalty." ER, *supra*, at 291.

Second, the Arizona statute makes the voluntary E-Verify program mandatory for all Arizona employers. Ariz. Rev. Stat. § 23-214. It no longer suffices for employers in Arizona to employ the document-based I-9 Form process established by, and acceptable under, federal law. See 8 U.S.C. § 1324a(a)(1), (a)(3), (b). An Arizona employer that fails to participate in E-Verify may be denied economic development benefits, and forced to repay any benefits previously obtained from the state. Ariz. Rev. Stat. § 23-214.

III. PROCEDURAL BACKGROUND

A broad coalition of groups challenged the constitutionality of the Act soon after its passage. See Pet. App. 6a, 12a, 107a-09a. They alleged, among other things, that the Act was expressly and impliedly preempted by IRCA. *Id.* Named as defendants were Governor Napolitano, the Arizona Attorney General, Arizona county attorneys, and other state officials responsible for enforcing the Act. *Id.* The multiple similar lawsuits later were consolidated for decision. *Id.*

The district court held that the Act was not preempted. With respect to express preemption, it acknowledged that the penalties imposed by the Act qualify as "sanctions" within the meaning of IRCA's preemption provision. Pet. App. 61a-76a. It concluded, however, that the Act constituted a "licensing [or] similar law[]," and so fell within the preemption provision's savings clause. *Id.* The court further held that the Act's provisions concerning E-Verify were not impliedly preempted. *Id.* at 82a-85a. Although it recognized that Congress had made E-Verify voluntary, it found no preemption because Congress had not explicitly precluded states from making the program mandatory.

The Ninth Circuit affirmed. It agreed that, because Arizona had defined the sanctions imposed by the Act as "licensing" penalties, the statute fell within the savings clause of IRCA's preemption provision. Pet. App. 14a-19a. It also agreed that, because Congress "could have, but did not, expressly forbid state laws from requiring E-Verify participation," the sections of the Act mandating use of E-Verify were not preempted. *Id.* at 20a.

Both the district court and the Ninth Circuit viewed themselves as largely bound by this Court's 1976 decision in *De Canas* v. *Bica*. See Pet. App. 15a-16a, 69a-70a. That case, decided a decade before IRCA's enactment, held that a state statute regulating the employment of unauthorized workers was not preempted because the federal immigration laws in effect at the time did not address employment. The Ninth Circuit acknowledged that this Court recognized in 2002 that IRCA had dramatically changed the legal landscape—specifically, that IRCA "forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Hoffman*, 535 U.S. at 147 (alteration and internal quotation marks omitted); see Pet. App. 15a-16a. Nevertheless, the court of appeals summarily dismissed this Court's clear statement of IRCA's importance, on the basis that *Hoffman* "did not concern state law or the issue of preemption." Pet. App. 16a.

REASONS FOR GRANTING THE PETITION

The growing discord between national immigration policy enacted by the federal government, and the shadow immigration policy being enacted by states and localities, is an issue of great national importance. So too are the specific issues presented here; the decision below implicates the status verification process that every single employer is required to undertake for every single new hire. This affects not just each prospective employee in the nine states within the Ninth Circuit, but every employer doing business in the dozens of states that have legislated on the subjects of alien hiring and immigration status verification. See generally *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (considering the "prospect" of action by "all 50 States" in evaluating preemption); *Buckman Co.* v. *Plaintiffs'*

Legal Comm., 531 U.S. 341, 350 (2001) (same). This is an area in which Congress has declared that uniformity is essential, see generally *Zadvydas* v. *Davis*, 533 U.S. 678, 700 (2001) (recognizing the "Nation's need to 'speak with one voice' in immigration matters"), and the current state of affairs is intolerable for workers and employers alike. This burgeoning uncertainty is only exacerbated by the absence thus far of the United States' views on this debate. Cf. *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000) (considering federal agency's views).

The decision below was able to approve of this result only by departing from this Court's decision in *Hoffman* and badly misreading federal law. To bring uniformity and clarity to rules that fundamentally affect primary conduct of an enormous number of people, to clarify the meaning and scope of *Hoffman*, and to resolve any possible tension between *Hoffman* and *De Canas*, the views of the Solicitor General should be sought and the petition should be granted.

I. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE.

1. Congress crafted a national immigration policy that is, and expressly is intended to be, "comprehensive" and "uniform[]." *Hoffman*, 535 U.S. at 147; IRCA § 115, 100 Stat. at 3384. IRCA generally, and the employment status verification system in particular, affect every employer and every employee in the country. In creating this national system, Congress balanced multiple competing considerations implicated by the employment of aliens. So, for instance, Congress intended IRCA to deter illegal immigration, but not at all costs; it also sought a system that was "the least disruptive to the American businessman," and to "minimize the possibility of employment dis-

crimination." H.R. Rep. No. 99-682, pt. I, at 56 (1986); S. Rep. No. 99-132, at 8-9 (1985); see *Collins Foods Int'l, Inc.,* v. *INS*, 948 F.2d 549, 554 (9th Cir. 1991) ("the legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process").

The I-9 Form process, which was the "keystone and major element" of this statute, reflected these goals. Statement of the President, Nov. 10, 1986, *reprinted in* 1986 U.S.C.C.A.N. 5856-1; see *Hoffman*, 535 U.S. at 147-48. Congress intended this system to be enforced "uniformly" throughout the United States, IRCA § 115, 100 Stat. at 3384, and this uniform system likewise is comprehensive. Federal law specifies who may work in this country, and who may not. See *supra* pp. 5-8. It details the obligations of employers, and of employees. See *supra* pp. 5-8. It prohibits certain conduct by employers and employees, provides a specialized federal system for adjudicating violations, and creates a substantial safe harbor for employers who "compl[y] in good faith" with the I-9 Form's requirements. See 8 U.S.C. §§ 1324a(a)(3), 1324c. The subsequent establishment of E-Verify and the other pilot programs took place against this backdrop. Congress established these programs on a limited and experimental basis so as not to fracture the nationally uniform system that it had created, and to forestall other adverse effects of E-Verify that it anticipated might arise. *See infra* p. 27.

Having crafted a national status verification system for employment that balanced multiple considerations, and having calibrated its chosen enforcement mechanisms, Congress took pains to preserve its authority in this field. IRCA 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). That is, Congress enacted a broad pre-emption provision that contained only a limited exception for sanctions based on true licensing laws that require proper qualifications, and that rely on a federal finding of an IRCA violation.

2. The consistency sought by Congress is severely threatened by state legislatures and local governments across the country, which have enacted a "cacophony" of statutes that disrupt and seek to supplant federal immigration law. To permit this situation to persist is to sow confusion among employers and employees, as well as legislatures and town councils attempting to ascertain the proper zones of federal and local interest in the field of immigration.

The stream of state immigration legislation that began to flow a few years ago has become a flood. The National Conference of State Legislatures (NCSL) recently reported that 300 immigration bills were introduced in state legislatures in 2005, and 38 laws were enacted. NCSL, *2009 Immigration-Related Bills and Resolutions in the States*, *supra*. Those numbers doubled in 2006, when 570 bills were introduced and 84 laws enacted. *Id.* The numbers then tripled in 2007 and 2008, with more than 1,300 bills introduced and 200 laws enacted in each year. *Id.* And in the first three months of this year alone, legislatures across all 50 states introduced over 1,000 bills pertaining to immigration. *Id.* At least 150 of these bills (in 41 states) relate specifically to employment. *Id.*

These statutes have created a "patchwork of ... [different] laws, rules, and regulations," which is difficult for employers and employees to understand, and even

harder for them to follow. *Rowe* v. *N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 996 (2008); see *Hoffman*, 535 U.S. at 147-49. Some states have enacted laws similar to one another—relying, for instance, on model legislation proposed by the anti-immigration group IRLI.[5] Others have enacted slight variations, while still more have enacted directly contradictory rules. An area that is intended to be nationally uniform now requires national employers to engage in a 50-state compliance strategy, and local and regional employers to proceed town-by-town or county-by-county in making employment decisions. It also subjects employees to a labyrinth of differing and conflicting requirements for proof of work authorization, and exposes them to a much greater risk of unlawful harassment and discrimination, as DHS-sanctioned reports have found.[6]

Directly relevant here, this variability plagues state efforts to implement E-Verify. Some states, including Arizona and Mississippi, now require all employers to use E-Verify. See Ariz. Rev. Stat. § 23-214; Miss. Code Ann. § 71-11-3(3)(d), (4)(b)(i). In Colorado, Georgia, Minnesota, Missouri, and Rhode Island, as well as municipalities in Alabama, California, and Pennsylvania, E-Verify is required for businesses seeking public contracts.[7] Still other states require

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[5] *See* Immigration Reform Law Institute, *IRLI Model Taxpayer and Citizen Protection Act*, Part B, *available at* http://www.irli.org/tcpa_partb.html.

[6] Westat, *Findings of the Web Basic Pilot Evaluation* 77-79 (Sept. 2007) (hereafter "*Findings*"), *available at* http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.

[7] *See* Colo. Rev. Stat. § 8-17.5-102; Ga. Code Ann. § 13-10-91; Exec. Order No. 08-01 (Minn. Jan. 7, 2008); Mo. Rev. Stat. §§ 285-525, -530; Exec. Order No. 08-01 (R.I. Mar. 27, 2008); Albertville, Ala., Resolution No. 945-08 § 4; Mission Viejo, Cal.,

employers to use a state-created employment verification system, which may or may not be compatible with E-Verify. See, *e.g.*, Okla. Stat. tit. 25, §§ 1312, 1313(B)(2); Utah Code Ann. § 63G-11-103.[8] For its part, Illinois enacted a law that *forbade* employers from using E-Verify. 820 Ill. Comp. Stat. 55/12. The United States sued Illinois, and prevailed, on its argument that the Illinois statute was preempted by federal law. See *United States* v. *Illinois*, No. 07-3261, 2009 WL 662703 (C.D. Ill. Mar. 12, 2009).[9]

Ordinance No. 07-260 § 1; Hazleton, Pa., Ordinance No. 2006-18 § 4(D).

[8] The "Status Verification System" mandated in Oklahoma, for example, encompasses not only E-Verify, but also the "Social Security Number Verification Service" (even though it is impermissible to use the Social Security system for this purpose, *see* Social Sec. Admin., *Social Security Number Verification Service (SSNVS) Handbook* (Dec. 2008)) and other "third party" verification systems (which do not yet exist and are not authorized by federal law). *See* Okla. Stat. tit. 25, §§ 1312, 1313(B)(2); *cf.* S.C. Code Ann. § 41-8-20 (requiring employers to verify the status of new employees either by using E-Verify or through state documentation). Louisiana and Tennessee restrict the number and types of documents employers can use to verify work authorization status, which arguably prohibits compliance with E-Verify. *See* Tenn. Code Ann. § 50-1-106; La. Rev. Stat. Ann. § 23:992.2.

[9] These requirements are enforced by a wide range of sanctions. In Arizona, as discussed above, violations are punishable by suspension or revocation of the employer's "licenses," which the state defines broadly to go well beyond the traditional definition of a "license" and include withdrawal of the company's charter. *See* Ariz. Rev. Stat. § 23-212. Similar penalties are available for violations in Mississippi, Missouri, South Carolina, Tennessee, and West Virginia, as well as in certain municipalities in Alabama, California, and Pennsylvania. *See* Miss. Code Ann. 71-11-3(7)(e); Mo. Rev. Stat. §§ 285-525, -530; S.C. Code Ann. § 41-8-50; Tenn. Code Ann. § 50-1-103(e); W. Va. Code § 21-1B-7; Albertville, Ala., Resolution No. 945-08 § 4; Apple Valley, Cal., Resolution No. 2006-82; Hazleton, Pa., Ordinance

These are just a few of the differing verification requirements that states and municipalities have imposed on employers in recent years, and still more statutes—with still different standards and penalties—are under consideration.

3. It is immensely burdensome, if not in some circumstances impossible, to comply with the different immigration regulations of all 50 states and even more individual localities. Actions that are required in some jurisdictions are prohibited in others, and variations on state-level requirements abound. And, employers always must further take into account federal immigration law, with its detailed—and supposedly "comprehensive" and "uniform[]"—requirements. See *Hoffman*, 535 U.S. at 147; IRCA § 115, 100 Stat. at 3384.

Employees also suffer. It is all but certain—particularly given the state of the economy and the numerous applicants for every job opportunity—that some employers, when confronted with this patchwork of conflicting state regulations and the severe sanctions for violations, will simply avoid hiring individuals who even appear to pose a risk of an immigration violation, based on their race, ethnicity, or national origin. See, *e.g.*, *Findings*, *supra*, at 78-79 (noting problems with employer response to E-Verify

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No. 2006-18 § 4(B). Other jurisdictions provide that employers found to have violated state immigration laws are subject to tort liability and civil damages. *See* Okla. Stat. tit. 25, § 1313(C); La. Rev. Stat. Ann. 23:994; Miss. Code Ann. § 71-11-3(4)(d); Hazleton, Pa., Ordinance No. 2006-18 § 4(E). In Louisiana and West Virginia, authorities may also impose civil and criminal penalties (including fines or, in some cases, imprisonment) on employers they deem to have hired illegal aliens. La. Rev. Stat. Ann. § 23:993; W. Va. Code § 21-1B-5; *see also* Suffolk County, N.Y., Local Law No. 52-2006 § 8.

requirements). This approach will adversely impact racial and ethnic minority groups most heavily, but the burdens will extend to all persons, regardless of nationality or race. Congress itself recognized that permitting individual jurisdictions to institute different employee verification systems, many of them focused single-mindedly on the exclusion of illegal aliens, likely would lead to increased discrimination and fraud. See H.R. Rep. No. 99-682, pt. I, at 56; S. Rep. No. 99-132, at 8-9. Indeed, several measures in IRCA were designed to prevent this result, which is now threatened by state legislative efforts. See 8 U.S.C. § 1324b(a) (prohibiting several practices, including "request[ing] ... more or different documents" than § 1324a requires, which might mask discrimination).

The range of individuals and interests adversely affected by these laws is reflected in the extraordinary coalition that has joined arms in opposition to the Arizona statute. Business and community based associations, labor groups, and civil rights organizations all have submitted briefs challenging the Arizona statute and others like it. The simple fact that these parties readily join together on this issue testifies to its exceptional importance and the urgent need for this Court's review.

4. Nothing will be gained, and much will be lost, by allowing these problems to fester. For every month that passes without clarification of the law, state legislatures and county and municipal governments will continue to enact more immigration statutes that intrude upon the federal domain. NCSL, *2009 Immigration-Related Bills and Resolutions in the States*, *supra* (noting the "record numbers of bills and resolutions" recently introduced). Additional challenges will be filed, to be followed by years of

costly litigation. Only if state and local legislators receive guidance now can they be induced to hold or modify their legislative efforts, and can the limited resources of litigants and lower courts be saved.

Only this Court can provide the clarity and uniformity that the problem of hiring unauthorized aliens requires. The preemption issues presented in this case have been vetted by lower courts, and already have resulted in a split of authority. The district court and Ninth Circuit in this case held that state employment verification statutes are neither expressly nor impliedly preempted by federal immigration law. Specifically, both courts gave a broad construction to the savings clause in IRCA's preemption provision, thereby as a practical matter eviscerating the preemption provision. Pet. App. 14a-19a, 61a-76a. A district court in Missouri, addressing a similar municipal ordinance, held likewise. See *Gray* v. *City of Valley Park*, No. 07-881, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008), *aff'd on other grounds*, 567 F.3d 976 (8th Cir. 2009).

In contrast, district courts in Oklahoma and Pennsylvania have held that local immigration regulations of this sort conflict with the "comprehensive" federal immigration scheme, and therefore are preempted. *Lozano* v. *City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *appeal docketed*, No. 07-3531 (3d Cir. Aug. 30, 2007); *Chamber of Commerce* v. *Henry*, No. 08-109, 2008 WL 2329164 (W.D. Okla. June 4, 2008), *appeals docketed*, Nos. 08-6127, 08-6128 (10th Cir. June 19, 2008). The Pennsylvania court explicitly rejected the broad interpretation of "licensing" adopted here by the Ninth Circuit, holding instead that a state statute falls within the savings clause only when it conditions a license or business permit on a

record of prior compliance with *federal* immigration law. *Lozano*, 496 F. Supp. 2d at 525.

Lower-court decisions, however, will do little to solve this national problem. An opinion by one court of appeals on the constitutionality of one statute, or even several, will not stop states and municipalities in other circuits from enforcing their own provisions, or enacting new ones. This Court is the only one that can address this issue definitively, and it should do so now. Delay will allow the pace of state and local immigration legislation to continue, and the concomitant damage to federal immigration policy. The collateral effects of this process, if permitted to go forward, will be felt by employers, employees, states and localities, and the lower courts for years to come. To bring some level of control and certainty to the process, this Court should grant the petition.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT, AND MISINTERPRETS FEDERAL LAW.

Review is further warranted to correct the Ninth Circuit's disregard of this Court's decision in *Hoffman*, and its resulting misinterpretation of IRCA and IIRIRA.

1. This Court in *Hoffman* recognized that IRCA is a "comprehensive scheme" for regulating the employment of undocumented aliens and, further, that federal law "forcefully made combating the employment of illegal aliens central to the policy of immigration law." 535 U.S. at 147 (alteration and internal quotation marks omitted). *Hoffman* explained that IRCA occupies this field, and so precludes the enforcement of conflicting regulations—there, regulations administered by the National Labor Relations

Board. *Id.* at 145-49. Just as IRCA preempted the federal regulation at issue in *Hoffman*, it preempts the state statute at issue here.

The Ninth Circuit, however, held *Hoffman* irrelevant on the theory that *Hoffman* "did not involve preemption, or indeed any state regulation." Pet. App. 39a-40a. That reasoning simply ignores *Hoffman*'s fundamental holding. The question presented there, as here, was whether IRCA is sufficiently comprehensive to displace other employment-related regulation of immigration policy. 535 U.S. at 145-49. This Court held that it is. *Id.* That *Hoffman* addressed displacement of a federal regulation, rather than preemption of a state statute, is no justification for so lightly casting it aside.

The Ninth Circuit further reasoned that, because *Hoffman* is irrelevant, its preemption analysis instead must be governed by this Court's earlier decision in *De Canas*. Pet. App. 40a ("Because it did not concern state law or the issue of preemption, *Hoffman* did not affect the continuing vitality of *De Canas*."). To the extent there is any inconsistency between *De Canas* and *Hoffman*, any such conflict can be resolved only by this Court, a factor that additionally would justify this Court's review. In fact, however, *De Canas* interprets a statutory regime that no longer exists—for the reasons explained in *Hoffman*—and the Ninth Circuit's decision to rely on it anyway suggests a less than faithful reading of this Court's precedents.

De Canas held that a state statute regulating the employment of aliens was not preempted by federal immigration law. 424 U.S. at 355-56. That case, however, was decided in 1976, a decade before the passage of IRCA. See *id.* It interpreted the preemptive effect of a prior statutory scheme (the Immigra-

tion and Nationality Act), and concluded that *at that time* federal law evinced "at best ... a peripheral concern with employment of illegal entrants." *Id.* at 360. IRCA amended federal immigration law to fill precisely this gap, as *Hoffman* explained: Under IRCA, "the employment of illegal aliens [became] central to the policy of immigration law." *Hoffman*, 535 U.S. at 147 (alteration and internal quotation marks omitted).

Simply put, the Ninth Circuit relied on a 30-year-old decision interpreting the preemptive effect of a superseded federal law in order to ignore a seven-year-old decision of this Court that did take account of the major intervening changes in federal law. A faithful application of *Hoffman* would have recognized that IRCA created a comprehensive scheme concerning employment of aliens, and that it precludes inconsistent regulatory regimes. *Hoffman*, 535 U.S. at 147 The Arizona statute (and others like it) is just such a regime. It establishes independent standards and penalties that are not contemplated by federal law, and it mandates that state employers use an employment verification system that federal law explicitly states shall be voluntary. These state regulations, no less than the federal ones at issue in *Hoffman*, intrude into a field that Congress "forcefully" declared is addressed exclusively by federal immigration law. See *id.*

2. The Ninth Circuit's misunderstanding of *Hoffman* contributed to its misinterpretation of IRCA and IIRIRA. Those provisions, read correctly, clearly preempt the Arizona statute.

a. IRCA expressly preempts state and local laws that "impos[e] 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 Ninth Circuit held that the Arizona statute—which imposes sanctions on employers that knowingly hire unauthorized aliens (as determined by a *state* judge)—is not preempted because the statute affects what the state calls "licenses," and therefore qualifies as a "licensing [or] similar law" within the savings clause of IRCA's preemption provision. Pet. App. 14a-19a.[10]

This conclusion seriously distorts the meaning of the phrase "licensing [or] similar law," and subverts congressional intent. A state statute is a "licensing [or] similar law" under IRCA only if it conditions the issuance or retention of a genuine license (or similar business permit) on a prior determination by *federal* authorities of noncompliance with *federal* immigration law. See 8 U.S.C. § 1324a(h)(2). Far from permitting state authorities to adjudicate an individual's federal immigration status, or whether he or she is work-authorized, IRCA provides for these determinations to be made by federal officials, in specialized administrative proceedings conducted under federal rules and regulations. See generally *id.* § 1324a(e); 28 C.F.R. pt. 68. It is only after such a predicate federal adjudication that a state may tack on additional "sanctions" through a "licensing [or] similar law," and so be preserved by IRCA's savings clause.[11]

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[10] There is no dispute that the Arizona Act, if it does not qualify as a "licensing [or] similar law" under the savings clause, is preempted by § 1324a(h)(2).

[11] *See Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989) ("[I]n the absence of a plain indication to the contrary ... Congress when it enacts a statute is *not* making the application of the federal act dependent on state law.") (emphasis added; internal quotation marks omitted).

This interpretation of the savings clause is confirmed by its history and purpose. The savings clause was adopted to ensure that states could rely on federal determinations of compliance with federal immigration laws when issuing or considering business licenses or permits (in particular, for farm labor contractors). See H.R. Rep. No. 99-682, pt. I, at 58; see also 29 U.S.C. § 1813(a)(6) (permitting actions against the license of a farm labor contractor only after the individual "has been found to have violated [IRCA]"). It never was intended to allow states to judge for themselves the federal immigration or work authorization status of individuals. The committee report that accompanied IRCA affirms that the savings clause was intended merely to allow states to add on additional sanctions (in the form of the "suspension, revocation or refusal to reissue a license") for persons "who ha[ve] been found to have violated the sanctions provisions *in this legislation*." H.R. Rep. No. 99-682, pt. I, at 58 (emphasis added). Arizona's contrary rule flies in the face of IRCA's fundamental purposes of establishing a national and "uniform[]" verification system. IRCA § 115, 100 Stat. at 3384.

IRCA's broad preemption provision indicates that the savings clause was intended to mean "licensing" in the traditional sense—*i.e.*, as a genuine qualification to do business, such as a professional certification or permit. Arizona has taken this narrow exception to the preemption provision and allowed it to swallow the rule by defining licenses to include mere documentation requirements that enable an employer to do business, such as articles of incorporation. Congress could not have meant to allow states to circumvent IRCA's express limitation simply by requiring businesses to register a name or tax identification number and calling such documentation a "license."

Indeed, Arizona has exempted from the definition of "license" the very heart of what licensing has traditionally meant—professional licenses. Arizona Rev. Stat. § 23-211(9)(c)(ii).

This Court has repeatedly "declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law." *Geier*, 529 U.S. at 870 (quoting *United States v. Locke*, 529 U.S. 89, 106-07 (2000) (alteration omitted)). That is exactly what the Ninth Circuit's interpretation of IRCA's savings clause would accomplish. It would authorize the creation of a parallel system of state and municipal employment verification and penalty provisions, backed by the bluntest of sanctions—the "business death penalty"—without any prior adjudication by the designated federal authorities. This is not what Congress intended.

b. The Ninth Circuit further erred in its conclusion that Arizona acted permissibly by making E-Verify mandatory. IIRIRA provides that the federal government "may not require any person or other entity to participate" in E-Verify. IIRIRA § 402(a). The Ninth Circuit concluded, however, that this provision expressly limits only the *federal* government, and so does not apply to state statutes like Arizona's. Pet. App. 20a. In short, it concluded that what DHS Secretary Napolitano now is expressly forbidden from doing as a federal official, she—and her fellow 49 governors—were free to do as state executives. Nothing in IIRIRA supports this counterintuitive result.

The text of IIRIRA repeatedly and expressly makes clear that E-Verify is, and must be administered as, a voluntary program. The voluntary nature of E-Verify is clear from the very title of the relevant statutory provision: "*Voluntary* Election to Participate in a Pilot Program." IIRIRA § 402 (emphasis added). The

statute gives employers the choice as to whether to participate: "[A]ny person or other entity that conducts any hiring ... may *elect* to participate in that pilot program." *Id.* § 402(a) (emphasis added); see also *id.* § 402(c)(2)(A) (a participating employer is an "electing person"). And, the Attorney General is required to "widely publicize ... the voluntary nature of the pilot programs." *Id.* § 402(d)(2); accord *id.* § 402(d)(3)(A). Everything about E-Verify is voluntary—with the exception of certain specified applications to the federal government, the enumeration of which demonstrates the otherwise blanket nature of the rule. See *id.* § 402; see also *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) ("*Inclusio unius, exclusio alterius.*").

Congress made E-Verify voluntary for good reason: It is error-prone and requires participating employers to weigh possible benefits against serious burdens. A recent DHS-commissioned study of the program found that it misidentified the employment eligibility of naturalized citizens almost 10% of the time, and that foreign-born, work-authorized individuals were 30 times more likely to receive an erroneous tentative nonconfirmation than U.S.-born individuals. *Findings*, *supra*, at 97. These errors impose significant costs on employers. Under federal law, an employer is not permitted to rely on an initial, "tentative nonconfirmation" to take adverse action against the employee.[12] Instead, the employer must allow the employee to lodge a challenge, and then must wait until a federal agency has resolved the challenge, *id.*, which takes on average anywhere from 19 to 74 days, see *Findings*, *supra*, at 78-79. The burdens of this

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[12] *See* Pilot Programs for Employment Eligibility Confirmation, 62 Fed. Reg. 48,309, 48,312 (Sept. 15, 1997).

process are particularly acute for small businesses, which cannot afford significant delays in training and transitioning new employees. *Id.* at xxii-xxiii, 24. And, of course, employees who receive a "tentative nonconfirmation"—even if they later succeed in challenging that designation—can lose valuable training opportunities and may suffer harassment or other forms of discrimination. *Id.*

Congress considered these issues in enacting IIRIRA, and struck the delicate balance it deemed appropriate. It made the I-9 Form process (with a variety of document-based verification methods) mandatory, and created E-Verify as a voluntary and experimental system, which employers may choose to use—or not—in their discretion. See 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b). Congress has repeatedly rejected proposals to make the E-Verify system mandatory for all employers. See, *e.g.*, H.R. 98, 110th Cong. § 5(a) (2007); H.R. 1951, 110th Cong. § 3 (2007). It is not for Arizona to disregard this judgment. See, *e.g.*, *Geier*, 529 U.S. at 881-82. Indeed, this Court has held that the Supremacy Clause prohibits a state from requiring the use of a single standard when Congress "deliberately sought variety" by approving "a mix of several different" options to reach its regulatory goal, as it did when it enacted IRCA and created the I-9 Form process. *See id.* at 878. Arizona's law stands in clear conflict with Congress's express decision to make E-Verify voluntary, and therefore is preempted. *See id.* at 881-82.

Because Arizona's law is typical of state and local laws throughout the United States that regulate employment of aliens, and which intrude into an area Congress plainly preempted, it is particularly appropriate for the Court to review the ruling of the court of appeals in this case. At a minimum, the Court

should solicit the views of the Executive Branch on the importance of the issue presented and the scope of Congress's preemptive intent.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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

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

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

DAVID A. SELDEN
JULIE A. PACE
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
3300 N. Central Avenue
Suite 1800
Phoenix, AZ 85012
(602) 798-5472

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

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

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

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

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

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

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

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

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

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

Counsel for Petitioner
Wake Up Arizona! Inc.

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* Counsel of Record