Nos. 07-17272, 07-17274, 08-15357,
08-15359 & 08-15360 (Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA CONTRACTORS ASSOCIATION, INC., *et al.,*
Plaintiffs-Appellants,

vs.

CRISS CANDELARIA, *et al.,*
Defendants-Appellees,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF ARIZONA
NOS. CV07-02496-PHX-NVW, CV07-02518-PHX-NVW
HON. NEIL V. WAKE, U.S. DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF DEFENDANTS-APPELLEES FOR DENIAL OF PETITIONS FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *Amicus Curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

Dated: December 24, 2008

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is a nonprofit organization founded in 1981. From its inception, Eagle Forum ELDF has defended American sovereignty and promoted adherence to the U.S. Constitution; repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States; consistently stood in favor of enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens; and defended federalism, including the ability of state and local government to protect their communities and to maintain order. For these reasons, Eagle Forum ELDF has a direct and vital interest in the issues before this Court. Because some parties withheld consent, Eagle Forum ELDF seeks leave to file this brief for the reasons set forth in the accompanying motion.

INTRODUCTION

In this facial challenge to the Legal Arizona Workers Act, ARIZ. REV. STAT. §§23-211 to -216 ("Act"), the only facts are the relevant statutes' texts. The petition's three overlapping arguments assert that: mandating E-Verify conflicts with its voluntary nature under federal law; federal law conflict preempts the Act, even if it does not expressly

preempt the Act; and federal law preempts the Act's definition of "licensing," even if it does not expressly preempt the entire Act. Because each argument lacks merit, this Court should deny the petition.

I. MANDATING E-VERIFY IS NOT PREEMPTED

Relying primarily on *Geier v. Am. Honda Motor Co.,* 529 U.S. 861 (2000), plaintiffs argue that the panel "overlooked" that the Act's mandating E-Verify conflicts with E-Verify's voluntary status under federal law. Pet. at 3-6.[1] To the contrary, however, the panel *did* address this argument. *CPLC v. Napolitano,* 544 F.3d 976, 985-86 (9th Cir. 2008) (Slip. Op. at 13,076-78). In any event, plaintiffs are not merely wrong but "*quite wrong* to view [the] decision [not to regulate] as

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[1] The petition (at pp. 4-6) also includes makeweight arguments that (1) statutory headings make E-Verify voluntary, but courts look to headings to resolve (not to create) doubt, *Zimmerman v. Oregon Dep't of Justice,* 170 F.3d 1169, 1175 (9th Cir. 1999); (2) Pub. L. No. 104-208, §402(a), Div. C, 110 Stat. 3009-546 (1996) ("Secretary of Homeland Security may not require any person or other entity to participate in [E-Verify]") somehow prohibits all "government" from requiring participation in E-Verify, notwithstanding its express limitation to that single federal officer; and (3) Congress' subsequent failure to make E-Verify mandatory somehow modifies the original preemptive intent, *but see Fourco Glass Co. v. Transmirra,* 353 U.S. 222, 227 (1957) (revised or consolidated laws not "intended to change their effect unless such intention is clearly expressed").

the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 65 (2002) (emphasis added). While "an authoritative federal determination that the area is best left *un*regulated … would have as much pre-emptive force as a decision *to* regulate," *id.* at 66 (emphasis in original), *accord Geier,* 529 U.S. at 881, Congress obviously has not done so merely by declining to require E-Verify as a matter of federal law.

To foreclose state and local regulation, courts require that Congress make an affirmative statement against regulation, not that Congress merely refrain from regulating. *See, e.g., Sprietsma,* 537 U.S. at 67 (*Geier* involved "an affirmative policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car") (interior quotations omitted, emphasis in original); *Rowe v. N.H. Motor Trans. Ass'n,* 128 S.Ct. 989, 993, 996 (2008) (Airline Deregulation Act intended "to leave such decisions, where federally unregulated, to the competitive marketplace" to enable "maximum reliance on competitive market forces"). The merely voluntary nature of E-Verify does not even

come close to that standard.

II. THE ACT AND IRCA DO NOT CONFLICT

Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica,* 424 U.S. 351, 354 (1976), the Supreme Court has never held that every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). Instead, preemption hinges on what the state or local statute does and how it fits within the federal regulation of immigration.

The Immigration Reform & Control Act of 1986 ("IRCA") provides federal civil and criminal procedures and sanctions for employing or recruiting "unauthorized aliens" and expressly preempts state and local sanctions for those activities "other than through licensing and similar laws." 8 U.S.C. §1324a(h)(2). Its legislative history states that:

> [IRCA was] not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation … [or] 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.

H.R.Rep. 99-682(I), 58, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. Thus, both IRCA's plain language and legislative history preserve state and local authority over licensing and "fitness to do business" laws.

Plaintiffs essentially concede the panel's ruling on express preemption, but complain that the panel "*entirely failed to address* the [implied-preemption] claim." Pet. at 2 (emphasis in original).[2] Plaintiffs are simply wrong: the panel squarely addressed the conflict-preemption

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[2] By citing cases under inapposite statutory contexts to support the "centralized administration" and "balkanization-patchwork" uniformity argument, plaintiffs essentially concede the absence of preemption here. Pet. at 9, 16-17. First, *Garner v. Teamsters Local Union,* 346 U.S. 485 (1953), arises under the National Labor Relations Act, where "a presumption *of federal pre-emption* applies" from the National Labor Relations Board's primary jurisdiction. *Brown v. Hotel & Rest. Employees & Bartenders Intern. Union,* 468 U.S. 491, 502 (1984) (emphasis added). Second, *Rowe v. N.H. Motor Trans. Ass'n,* 128 S.Ct. 989 (2008), arises under the Airline Deregulation Act, where Congress intended "maximum reliance on competitive market forces" (*id.* at 993) and "to leave such decisions, where federally unregulated, to the competitive marketplace" (*id.* at 996). Here, by contrast, §1324a(h)(2) *expressly saves* state and local authority in a field within the historic state and local police power. *See also* note 3, *infra.*

argument by noting that this facial challenge does not demonstrate any implied conflict, *CPLC,* 544 F.3d at 985 (Slip. Op. at 13,076), much less a conflict sufficient to overturn a sovereign state's law. The petition not only "entirely fails" to address the panel's argument on facial challenges but also fails to rebut the balance of the panel decision that further supports the panel's conflict analysis.

A. <u>The Act Is Not Facially Preempted</u>. The panel held – and the plaintiffs do not dispute – that plaintiffs bring a facial challenge to the Act. *CPLC,* 544 F.3d at 979 (Slip. Op. at 13,065). Under *U.S. v. Salerno,* 481 U.S. 739, 745 (1987), a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." Moreover, "[t]he fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.; S.D. Myers, Inc. v. City & County of San Francisco,* 253 F.3d 461, 467 (9th Cir. 2001) (same); *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n.5 (1982). Although *Salerno* requires facial challenges to "meet a high burden of proof," *S.D. Myers,* 253 F.3d

at 467, the petition does not even acknowledge the issue.

As the Supreme Court recently emphasized, facial invalidation is counter to the judicial preference not to "nullify more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood,* 546 U.S. 320, 329 (2006). Facial challenges also interfere with the norm of statutory construction that enables avoidance of constitutional questions based on how narrowly a law is applied. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973); *cf. New York v. Ferber,* 458 U.S. 747, 767 (1982). Because the Act is within Arizona's police power and non-discriminatory, plaintiffs cannot satisfy the *Salerno* standard here.

B. <u>The Act Is Not Discriminatory</u>. Echoed by their *amici,* the plaintiffs argue that the Act is discriminatory. Pet. at 8. Of course, if E-Verify indeed were discriminatory, it would be unlawful merely to *allow* its use. *City of Los Angeles v. Lyons,* 461 U.S. 95, 105-06 (1983); *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 45 n.25 (1976). Whether mandatory or voluntary, however, E-Verify is not facially discriminatory.

At the outset, much of their discrimination argument arises from the plaintiffs' conflating the Equal Protection Clause with IRCA. Pet. at

11. Simply put, the Fourteenth Amendment – not IRCA – prohibits Arizona's discriminating on the basis of race or alienage. The cases that plaintiffs cite for interpreting IRCA to avoid discrimination necessarily apply only to areas to which IRCA in fact applies. *Collins Foods Int'l, Inc. v. INS,* 948 F.2d 549,554 (9th Cir. 1991); *Aramark Facility Servs. v. SEIU Local 1877,* 530 F.3d 817, 825 (9th Cir. 2008). Those cases cannot *expand* IRCA beyond its scope.

Targeted against persons popularly known as "illegal aliens," the Act "discriminates" based on illegality, not on alienage or race. Where, as here, the state or local law does not "discriminate[] against aliens *lawfully admitted* to this country," it is constitutional. *DeCanas,* 424 U.S. at 358 n.6 (emphasis added); *INS v. Nat'l Ctr. for Immigrants' Rights,* Inc., 502 U.S. 183, 196 n.11 (1991); *cf. Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979) (intentional discrimination requires action taken "at least in part *because of,* not merely *in spite of,* its adverse effects" on a protected class) (emphasis added). As such, the Act is subject to review under the rational-basis test, not strict scrutiny. *Plyler v. Doe,* 457 U.S. 202, 223 (1982) ("[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of

federal law is not a 'constitutional irrelevancy'"). Consistent with *DeCanas,* the Act readily meets the rational-basis test. The law does not prohibit facial "discrimination" against illegality.

C. <u>Presumption against Preemption Applies</u>. Citing a "historic sea change," plaintiffs argue that the panel mistook the application of the presumption against preemption. Pet. at 12-13. As relevant to the preemption issue here, there is no history of change, much less of a preemptive sea change.

Courts apply a presumption against preemption for fields traditionally occupied by state and local government. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947) ("presumption against preemption" applies to finding preemption); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (even after preemption found, "presumption against preemption" applies to determining the federal statute's preemptive scope); *Altria Group, Inc. v. Good,* __ U.S. __, 2008 WL 5204477, 4 (2008) ("when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption") (interior quotations omitted). When this "presumption against preemption" applies, courts will not assume

preemption "unless that was the *clear and manifest purpose* of Congress." *Santa Fe Elevator,* 331 U.S. at 230 (emphasis added).

Here, state and local government has traditionally occupied the field of business licensing and similar laws, the Supreme Court unanimously affirmed that exercise of the police power in *DeCanas* (notwithstanding the nexus with immigration law), and Congress expressly saved that exercise of the police power in IRCA. Plaintiffs do not and cannot cite "clear and manifest" congressional intent to displace states' historic police power over business licensing.

Numerous alternate rules of construction lead to the same conclusion. *U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (state law remains applicable where "Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it"); *Chem. Mfrs. Ass'n v. NRDC,* 470 U.S. 116, 128 (1985) ("absent an expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision"); *Nat'l Ass'n of Home Builders v. Defenders of*

Wildlife, 127 S.Ct. 2518, 2532 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (interior quotations omitted, alteration in original). If Congress had intended what plaintiffs claim, *that* would be a sea change. Even without the express savings clause, the absence of any supporting legislative history reveals the absence of any congressional intent to preempt the Act.

D. IRCA Does Not Preempt the Act. The plaintiffs argue that IRCA conflict preempts the Act because the Act undermines national uniformity in employer sanctions and procedures. Pet. at 8-12. To the contrary, however, federalism permits and encourages state and local government to experiment with measures that enhance the general welfare and public safety. This federalism is central to our system of government, as Justice Kennedy wrote in a seminal ruling:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (citing Friendly, "Federalism: A Foreword," 86 Yale L. J. 1019 (1977) and G.

Wood, *Creation of the American Republic,* at 524-532, 564 (1969)).[3]

The seminal Supreme Court precedent is the unanimous *DeCanas* decision, which upheld a state law penalizing the employment of illegal aliens. Our system of dual sovereignties provides ample room for federal, state, and local government to address the various impacts of illegal aliens. Indeed, *DeCanas* upheld the state law because "it focuses directly upon these *essentially local problems* and is tailored to combat effectively the perceived evils." *Id.* at 357 (emphasis added). Nothing in IRCA or any other law in any way limits that authority or suggests that illegal entry and residency are to be protected, respected, or tolerated.

1. The Act Is Plainly within Police Power. Prior to IRCA's enactment, Arizona "possess[ed] broad authority under [its] police powers to regulate the employment relationship to protect workers within [Arizona]." *DeCanas,* 424 U.S. at 356. Similarly, prior to

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[3] As with their other arguments, note 2, *supra,* plaintiffs ground their claim that the Act's "harsh" sanctions conflict with federal law by citing inapposite cases. Here, they cite cases where state or local sanctions conflicted with U.S. foreign policy. Pet. at 11 (*citing American Ins. Ass'n v. Garamendi,* 539 U.S. 396, 427 (2003) *and Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 380 (2000)). Because there is no foreign-policy conflict here, *Garamendi* and *Crosby* are inapposite.

IRCA, federal law did not trench that "broad authority."

> [Courts] will not presume that Congress, in enacting [federal immigration law], intended to oust state authority to regulate the employment relationship … in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was the clear and manifest purpose of Congress would justify that conclusion.

DeCanas, 424 U.S. at 357 (interior quotations and citations omitted). Far from finding congressional intent to preempt state regulation of alien employment practices, *DeCanas* "rejected the pre-emption claim… because Congress *intended* that the States be allowed, to the extent consistent with federal law, [to] regulate the employment of illegal aliens." *Toll v. Moreno,* 458 U.S. 1, 13 n.18 (1982) (citing *DeCanas,* 424 U.S. at 361) (interior quotations omitted, emphasis and second alteration in original). Thus, prior to IRCA's enactment, it is indisputable that Arizona's police power included the authority to adopt the Act and to regulate the business licenses of entities within Arizona.

Moreover, "broad authority" to combat illegality is central to the "police power." *Jacobson v. Massachusetts,* 197 U.S. 11, 27 (1905) (under "principle of self-defense, … a community has the right to protect

itself"). Indeed, "suppression of [violent crime] has always been the prime object of the States' police power." *U.S. v. Morrison,* 529 U.S. 598, 615 (2000); *Slaughter-House Cases*, 16 Wall. 36, 62 (1873) (police power extends "to the protection of the lives, limbs, health, comfort, and quiet of all persons") (interior quotations omitted). Plaintiffs' view would deny Arizona the "right to protect itself" from unlawful employment and residency. The lawlessness that follows is predictable and, if Arizona has the "right to protect itself," entirely preventable.

2. IRCA Did Not Displace Police Power. The prior sections establish that Arizona had the police-power authority to regulate the employment of illegal aliens prior to IRCA's enactment in 1986; that the Act falls squarely within that police power; and that IRCA would not have displaced that police power (and the related Supreme Court decisions) *sub silentio.* To complete the analysis, IRCA emphatically *did not* displace that police power.

At the outset, §1324a(h)(2)'s plain language saves state and local authority for licensing and similar laws, an area that state and local government historically have occupied. Thus, while §1324a(h)(2) plainly establishes express preemption, it equally plainly saves the state and

local authority recognized in *DeCanas*. Given the express statutory language and the presumption against preemption even when interpreting express preemption, §1324a(h)(2) clearly does not preempt the Act. *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 568 (2005) ("the authoritative statement is the statutory text, not the legislative history"); *Medtronic,* 518 U.S. at 485 (presumption against preemption applies to determining statute's preemptive scope). This Court can begin and end its inquiry with §1324a(h)(2)'s plain language.

Should the Court analyze the legislative history, however, the available history does not alter the outcome. The House report expressly enumerates certain preempted actions (namely, civil and criminal sanctions for employment and recruitment) while also enumerating non-preempted actions (namely, denying licenses to those found to have violated immigration laws and "fitness to do business laws"). H.R.Rep. 99-682(I), at 58, *reprinted in* 1986 U.S.C.C.A.N. at 5662. Although the House report does not expressly authorize enforcement of a state or local ordinance prior to federal enforcement of immigration laws, the House report does not expressly preempt that either. *Id.* Given the presumption against preemption, even in

interpreting expressly preemptive statutes, *Medtronic, supra,* the House report does not provide a "clear and manifest" congressional intent to preempt that which *DeCanas* allowed. *Chem. Mfrs. Ass'n,* 470 U.S. at 128 (Congress would not "ignore the thrust of an important decision" *sub silentio*). In short, nothing suggests that Congress ever intended to preempt state and local actions like the Act.

III. IRCA DOES NOT SUPPORT A QUALIFICATION-BASED DEFINITION OF "LICENSE"

Plaintiffs also rehash their most inventive claim: that IRCA's savings clause for "licensing and similar laws" refers only to qualification-based licenses such as medical licenses, not mere business licenses. Pet. at 13-17. Because IRCA's plain language would not support that limitation under a presumption *of* preemption, much less under a presumption *against* preemption, the panel properly disposed of this argument. *CPLC,* 544 F.3d at 984-85 (Slip. Op. at 13,075-76).

Plaintiffs also reprise two prior arguments as bases to reject a broad definition of "licensing," namely that "states generally should *not* sanction … hiring" and state laws like the Act undermine national uniformity and lead to "balkanization." Pet. at 14, 16 (emphasis in original). First, given the presumption against preemption (Section II.C,

supra) and IRCA's express savings clause for licensing-based sanctions, this Court should not to presume that Congress would lecture the states on how they "generally should" calibrate sanctions in business licensing. Second, leaving aside the question of how adopting a federal standard could balkanize the nation, the same reasons compel allowing the states to follow their own course, even if – like so many aspects of multi-state operations – that "balkanizes" compliance for multi-state businesses.

CONCLUSION

For the foregoing reasons and those cited by Arizona, the petitions for panel and *en banc* rehearing should be denied.

Dated: December 24, 2008

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BRIEF FORM CERTIFICATE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing "Brief for *Amicus Curiae* Eagle Forum Education & Legal Defense Fund Filed in Support of Defendant-Appellee for Denial of Petitions for Rehearing" is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 3,380 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2007, and I have relied on that software's word-count feature to calculate the word count.

Dated: December 24, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of December, 2008, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that the appellate CM/ECF system's service-list report shows some of the participants in the case as not registered for CM/ECF use and that I have mailed a copy of the foregoing document by First-Class Mail, postage prepaid, to the following participants on the 24th day of December, 2008:

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