No. 09-115

In the Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES, ET AL., PETITIONERS,

v.

MICHAEL B. WHITING, ET AL., RESPONDENTS.

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

BRIEF FOR NATIONAL IMMIGRANT JUSTICE CENTER, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND AMERICAN IMMIGRATION COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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).

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The National Immigrant Justice Center, the American Immigration Lawyers Association, and the American Immigration Council respectfully submit this brief *amicus curiae* to provide a practitioner's perspective on the federal immigration laws as they relate to the employment of noncitizens.[1] From their vantage point in the trenches of immigration law, *amici* and their members are in a unique position to provide insight into the complexity of this federal regulatory scheme. That complexity is the product of a delicate balancing act by Congress with respect to a series of often-conflicting federal concerns—advancing an effective immigration policy, preventing racial and ethnic discrimination, avoiding burdens on commerce, and ensuring due process, to name a few. Appreciating this complexity is a critical step in assessing the extent to which Congress has preempted state intrusion into its uniform and comprehensive scheme of regulation—and the burdens employers, employees, and practitioners will face if States are permitted to adopt their own competing regulatory schemes.

The National Immigrant Justice Center ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC works to

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1 Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than Amici and their counsel has made a monetary contribution to the preparation or filing of this brief.

ensure human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the nation's leading law firms, NIJC provides direct legal services to approximately 10,000 individuals annually, including in applications for and consultations regarding employment authorization.

The American Immigration Lawyers Association ("AILA") is the national association of over 11,000 attorneys and law professors who practice and teach immigration law. AILA member attorneys represent U.S. families seeking permanent residence for close family members, as well as U.S. businesses seeking talent from the global marketplace. AILA members also represent foreign students, entertainers, athletes, and asylum seekers, often on a *pro bono* basis. Founded in 1946, AILA is a nonpartisan, not-for-profit organization that provides continuing legal education, information, professional services, and expertise through its 36 chapters and over 50 national committees. AILA's mission is to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.

The American Immigration Council ("AIC") (formerly the American Immigration Law Foundation) was established in 1987 as a not-for-profit educational and charitable organization. The mission of the AIC is to strengthen America by honoring our immigrant history and shaping how Americans think and act toward immigration now and in the future. The AIC exists to promote the prosperity and cultural richness of our diverse nation by educating citizens about the enduring

contributions of America's immigrants; standing up for sensible and humane immigration policies that reflect American values; insisting that our immigration laws be enacted and implemented in a way that honors fundamental constitutional and human rights; and working to achieve justice and fairness for immigrants under the law. The AIC's Legal Action Center works to advance fundamental fairness in U.S. immigration law and to protect the constitutional and legal rights of immigrants, refugees, and other noncitizens. To this end, the Center engages in impact litigation and appears as *amicus curiae* before administrative tribunals and federal courts in significant immigration cases on targeted legal issues. The Center also provides resources to lawyers litigating immigration cases and serves as a point of contact for lawyers conducting or contemplating immigration litigation. Working with other immigrants' rights organizations and immigration attorneys across the United States, the Center strives to promote the just and fair administration of our immigration laws.

Amici have a substantial interest in the issue now before the Court, both as advocates for the rights of immigrants generally and as the representatives of practitioners in the field. Given their experience and perspective, *Amici* are well-situated to assist the Court in understanding how this complex and intricate system of federal regulation actually operates and what burdens it necessarily imposes on employers, employees, and practitioners. To minimize those burdens—and to ensure the effectiveness of its policies—Congress intended its system to be both uniform and comprehensive. Those purposes and policies would be frustrated and the system

fundamentally disrupted if Arizona and other States were allowed to enter the arena with their own, competing systems of employment-related immigration law.

To be sure, the statutory provision preempting state and local sanctions in this area allows the states to retain their traditional ability to police the *licensing* of certain professions and activities. But that provision does not purport to allow the States to use the guise of "licensing" as a basis for a competing system of regulation or enforcement. Indeed, as explained in detail below, the Arizona scheme is preempted because of its conflict with the fundamental purposes of the federal system.

SUMMARY OF ARGUMENT

A close review of the elaborate process for verifying a noncitizen's authorization to work[2]—including the administrative structure for compliance, enforcement, and adjudication—reveals a robust and comprehensive federal scheme that is an integral part of federal immigration law and policy. Located in the Immigration and Nationality Act ("INA")—the overarching federal immigration law—this scheme originates in the Immigration Reform

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2 One aspect of this scheme is the voluntary E-Verify program, which allows employers to supplement the ordinary "I-9" verification process with an Internet-based verification system. IIRIRA § 403. But all employers still must complete the I-9 form, even if they supplement the process using E-Verify. *Id.* § 403(a)(1). In this brief, *Amici* will focus their attention only on the I-9 process. Petitioners and others more thoroughly address the E-Verify program and the implications of Arizona's approach to that issue.

and Control Act ("IRCA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), codified at 8 U.S.C. § 1324a, and has come to include an array of regulations, federal officers, and federal agencies. Employers and employees alike are bound by a set of intricately detailed rules and procedures, carefully crafted to serve the goals of federal immigration policy while also preventing racial and national origin discrimination, minimizing the burdens on commerce, and ensuring due process. The details of this system—as well as a sampling of some of the difficult problems employers and employees face under this regime—are described below. When considered in combination with the statutory language of IRCA and well-established principles of preemption, the realities of the I-9 system and the larger federal scheme lead to the inevitable conclusion that immigration-related employment law is, and must be, a uniquely federal concern.

To that end, Congress has expressly prohibited state and local governments from imposing their own sanctions on the employment of unauthorized workers, other than "through licensing and similar laws." Given the breadth of Congress's action in this area, that exception must be read narrowly, consistent with its language and (literally) parenthetical nature. It cannot be understood as a broad authorization for States to adopt their own competing regulatory schemes under the guise of "licensing."

Even if Arizona's law could properly be considered a "licensing" scheme, however, it would remain preempted. This Court has explained that even when an express preemption provision exists—and even when it contains a limited saving clause—"ordinary

pre-emption principles [still] apply." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 869-870 (2000). "[T]he saving clause (like the express preemption provision) does *not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869 (emphasis in original). Moreover, the presence of a "unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 508 (1988).

Congress's purposes here included ensuring a system of immigration-related employment law that remains "uniform[]" across the nation. IRCA § 115, 100 Stat. at 3384. Indeed, that uniformity is critical to the system's fairness to immigrants and employers, as well as to the goals of preventing discrimination and minimizing burdens on commerce. Together, the comprehensive nature of this federal scheme and the stated goal of uniformity manifest Congress's intent to preempt state laws establishing different systems of regulation and enforcement, whether those systems are intended to replace the federal scheme or merely to supplement it. *Amici* urge this Court to reverse the Ninth Circuit's decision and hold that Arizona's law is unconstitutional.

ARGUMENT

I. The federal scheme's complexity and deliberate uniformity reflects a careful and ongoing effort to balance competing concerns.

A. IRCA's regulatory scheme is delicately balanced to accommodate multiple, sometimes competing, federal interests.

The prospect of employment is frequently the magnet that draws an undocumented immigrant to the United States. Accordingly, as this Court has recognized, Congress adopted IRCA as a "comprehensive scheme" that "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147 (2002) (quoting *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 n.8 (1991)).[3]

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[3] The federal agencies' own materials underscore this focus. The introduction to the United States Citizenship and Immigration Services ("USCIS") M-274 Handbook for Employers explains that employers must verify employment authorization and identity of new employees because "[e]mployment is often the magnet that attracts individuals to reside in the United States illegally. The purpose of the employer sanctions law is to remove this magnet." USCIS, M-274 Handbook for Employers: Instructions for Completing Form I-9 (Rev. 04/03/09), available at http://www.uscis.gov/files/nativedocuments/m-274.pdf; see also USCIS, Worksite Enforcement, Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties (Nov. 25, 2008), at 4 ("The purpose of [IRCA] was to reduce the magnet of employment in the United States *thereby reducing the level of illegal immigration*.") (emphasis added).

Through IRCA, Congress sought to limit the employment of unauthorized workers by regulating employers directly. IRCA subjects employers to a series of graduated sanctions if they knowingly employ unauthorized workers or retain such workers after learning that their work authorization had expired. H.R. REP. 99-682(1), H.R. REP. 99-682, H.R. Rep. No. 682(1), 99th Cong., 2nd Sess. 1986, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

Congress entered this area of regulation with an acute concern that regulating the employment of noncitizens may lead to discrimination on the basis of race, ethnicity, and national origin. Many witnesses during the congressional hearings expressed the view "that employers, faced with the possibility of civil and criminal penalties, will be extremely reluctant to hire persons because of their linguistic or physical characteristics." 1986 U.S.C.C.A.N. at 5672. To assuage these fears, a compromise was forged to minimize discrimination by providing "substantial protections against discrimination in the form of a uniform verification process for all new hires and extensive monitoring and reporting requirements on the discrimination issue." *Id.* at 5672-73. With narrow exemptions, the final statutory scheme makes it an unfair immigration-related employment practice to discriminate with respect to hiring, firing, recruitment, or referral for a fee based on national origin or citizenship status. See 8 U.S.C. § 1324b(1). IRCA also provides U.S. citizens and other "protected individuals" (including certain categories of noncitizens) the right to challenge discriminatory hiring practices based on citizenship or noncitizenship status. See *id.* §§ 1324b(1) and (3).

Another critical concern was the potential cost to the employer. Accordingly, Congress endeavored to create a system that was "the least disruptive to the American businessman." H.R. Rep. No. 99-682(I), at 56, 1986 U.S.C.C.A.N. at 5660; S. Rep. No. 99-132, at 8-9; 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"). Congress expressed particular concern that the law not impose excessive burdens on small businesses or for isolated violations. See, *e.g.*, H.R. Conf. Rep. No. 99-1000, at 86 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5840, 5841; S. Rep. No. 99-132 at 32.

In short, as even the Ninth Circuit has recognized, IRCA 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." *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).

B. IRCA's regulatory scheme is uniform and comprehensive, allowing no room for an alternative state system like Arizona's.

The uniformity and comprehensive nature of the statute and its implementing regulations reflect this delicate balance. To avoid disturbing that balance, Congress expressly intended that its system be enforced by federal authorities exclusively, in a "uniform[]" manner throughout the United States. IRCA § 115, 100 Stat. at 3384. Of particular relevance here is the I-9 process, the "keystone and

major element" of the statute. Statement of the President, 1986 U.S.C.C.A.N. at 5856-1; see *Hoffman*, 535 U.S. at 147-148. An examination of the details of this federal procedure illustrates the importance of Congress's goal of uniformity—and how a state statute like Arizona's necessarily thwarts that goal, regardless of the State's intent in adopting it.

1. The statute makes it unlawful for an employer "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). An "unauthorized alien" is defined as an "alien [who] is not at that time either (A) * * * lawfully admitted for permanent residence, or (B) authorized to be so employed by [IRCA] or the Attorney General." 8 U.S.C. § 1324(a)(3). "Federal law exhaustively details a specialized administrative scheme for determining whether an employer has knowingly employed an unauthorized alien," subject to a range of civil and criminal penalties, cease and desist orders, and imprisonment. *Chamber of Commerce* v. *Edmondson*, 594 F.3d 742, 751 (10th Cir. 2010) (citing 8 U.S.C. § 1324a(e) and (f)).

Employers discharge their responsibilities under this section by completing an I-9 form for every employee and inspecting documents that establish the employee's identity and eligibility to work within three days of being hired. 8 C.F.R. § 274a.2(b). The prospective employee must present documents that establish his employment authorization and identity, 8 U.S.C. § 1324a(b)(1)(B), (C), (D), and must attest under penalty of perjury that he is authorized to work, *id.* § 1324a(b)(2).[4] Employees are under no

[4] Federal law further delves into such specific problems as lost verification documents, 8 C.F.R. § 274a.2(b)(1)(vi);

obligation to present any particular document on the list, nor may employers ask them to do so. *Id.*; 8 C.F.R. § 274a.2(b)(1)(ii)(A), (v). The law creates a substantial safe harbor for employers who "compl[y] in good faith" with the I-9 form's requirements. 8 U.S.C. § 1324a(a)(3).

Congress has more than once revisited the subject of document-based verification in order to further refine the federal system and best effectuate its goals. Thus, in 1990, Congress prohibited employers from requesting more or different documents than those the employee chooses to present. See Immigration Act of 1990, Pub. L. No. 101-649, § 535, 104 Stat. 4978, 5055 (codified at 8 U.S.C. § 1324b(a)(6)). In other words, if an employee produces an item on the federal government's list of acceptable documents, the employer *must* accept it, as long as it "reasonably appears on its face to be genuine." *Id.* § 1324a(b)(1)(A). This was done to prevent employers from using such requests as an avenue for discrimination. In 1996, Congress refined this provision, specifying that such conduct would be treated as discriminatory only if it was done "for the purpose or with the intent of discriminating." IIRIRA, Pub. L. No. 104-208, tit. IV, subtit. C, § 421, 110 Stat. 3009-546, 3009-670. There have been other refinements as well. See*, e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (restructuring the system for admitting legal

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expired employment verification, id. § 274a.2(b)(1)(vii); verifying work authorization after changes in employment status, id. § 274a.2(b)(1)(viii); and verifying the status of a previous employee, id. § 274a.2(c). It even specifies how long and in what manner employers must retain I-9 forms. 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2), (e).

immigrants, and adding penalties related to fraudulent documents).

Congress also regulated the manner in which the substance and process of work authorization enforcement could be changed. It required ongoing study and specified procedures to be followed before aspects of the work authorization process may be modified. It mandated ongoing reports about the implementation of § 1324a. See IRCA § 402, 100 Stat. at 3441 (codified in 8 U.S.C. § 1324a note). Further, the President is required to monitor the effectiveness of the verification system and to transmit to designated House and Senate committees written reports of proposed changes well in advance of their effective date, 8 U.S.C. § 1324a(d)(1)(A), (d)(3), which trigger mandatory congressional hearings under certain circumstances, *id.* § 1324a(d)(3)(C). Obviously, this system does not contemplate having state-specific enhancements enacted by state legislatures, without notice to or oversight by Congress.

2. Federal law defines in exquisite detail who is authorized to work, see, *e.g.*, 8 C.F.R. § 274a.12, and the manner in which every employer in the country must verify the work authorization for each prospective employee. Notably, Congress's scheme does not determine "employment authorization" or "employment eligibility" solely by reference to the individual's "citizenship or immigration status." See 66 Fed. Reg. 46812, 46815 (Sept. 7, 2001); see also 8 U.S.C. 1254a (distinguishing between "immigration status" and "work authorization"); 8 C.F.R. pt. 274a, subpt. B (addressing "Employment Authorization"); 73 Fed. Reg. 75446, 75448 (Dec. 11, 2008) (same). While some types of immigration status imply

employment eligibility, see, *e.g.*, 8 C.F.R. § 274a.12(a), other forms of lawful immigration status (such as visitor visas) are incompatible with employment. 8 C.F.R. § 214.1(e). Moreover, lack of lawful immigration status does not imply lack of work authorization. An individual may be authorized to work under IRCA independent of her specific "immigrant" status. See*, e.g.*, 8 C.F.R. § 274a.12(c)(8) (asylum applicants), (c)(9) (applications for adjustment of status), (c)(18) (individuals ordered deported where deportation cannot be effectuated).

Congress's chosen method of defining whether a particular noncitizen can work is one of the building blocks of the federal system. Yet this basic issue also illustrates the confusion and burdens generated when another sovereign—here, the State of Arizona—enters the area with its own system for immigration-related employment regulation and enforcement.

Under the Arizona statute, "the federal government's determination" creates only "a *rebuttable presumption* of the employee's lawful status." Ariz. Rev. Stat. § 23-212(H) (emphasis added). Moreover, the Arizona statute conflates employment eligibility with the wholly separate question of citizenship or immigration status. As Petitioner has explained, the Arizona statute's definition of work authorization is inexplicably tied to 8 U.S.C. § 1373(c), which relates to "citizenship or immigration status" instead of "employment authorization" or "employment eligibility." Ariz. Rev. Stat. § 23-212(H); see Pet. Br. 41.[5] Even with respect

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5 Under the Arizona statute, an employee's eligibility to work would be determined solely by his lawful status. Ariz. Rev. Stat. §§ 23-212(H). For example, in the case of an asylum applicant, whose lawful status (but not his

to this basic matter, then, Arizona's entry into this area of regulation creates confusion and directly conflicts with the various federal regulations facing employees and employers in that State.

3. Federal law creates a detailed array of allowances and exceptions for individuals wishing to work in the United States, see, *e.g.*, 8 C.F.R. § 274a.12, and it vests federal agencies with exclusive authority to administer these requirements, including components of the Departments of State, Labor, Homeland Security ("DHS"), and Justice ("DOJ").[6] Jurisdiction for determining whether an employer knowingly hired an unauthorized worker is vested in a specialized federal administrative review system, which affords employers the right to an adversarial hearing before a federal Administrative Law Judge ("ALJ").

Further, federal law sets, and limits, the appropriate prohibitions and sanctions on employers. It forbids an employer from hiring a noncitizen knowing he is unauthorized to work, or without

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work authorization) has expired, an employer could only escape liability under the Arizona statute by mounting an affirmative defense of good faith. *Id.* § 23-212(J). Arizona places the burden of proof on a defendant as to affirmative defenses. *Id.* § 13-205(A). Arizona's scheme differs significantly from the federal law, which is governed only by the individual's work authorization, not by his legal status as a noncitizen present in the country, as explained above, and does not require the employer to prove its innocence to escape liability.

6 See, e.g., 6 U.S.C. §§ 236, 271 et seq.; 8 U.S.C. §§ 1103(a), 1103(g), 1151, 1153, 1182(a)(5), 1201; 8 C.F.R. § 274a.12; *id.* pt. 1003; 20 C.F.R. pts. 655, 656.

complying with the I-9 process. 8 U.S.C. § 1324a(a)(1)(A), (B). It also provides a defense to liability to employers who comply in good faith with the I-9 process. *Id.* § 1324a(a)(3); 8 C.F.R. § 274a.4. Determining whether an employer knowingly hired an unauthorized worker is committed to a specialized federal administrative review system, which permits complaints to be filed and gives federal officials substantial discretion to determine which violations to pursue. 8 U.S.C. § 1324a(e)(1); 8 C.F.R. § 274a.9.

If the federal government decides to pursue a suspected violation, every aspect of the resulting proceeding is detailed in extensive provisions—everything from the manner in which the proceeding is commenced (via a "Notice of Intent to Fine") to the required method of serving such a notice. The federal statutes and regulations even specify the rules of procedure, which in certain ways mirror federal court proceedings, including the right to an adversarial hearing before a federal ALJ and placing the burden of proof on the government. 8 U.S.C. § 1324a(e); 8 C.F.R. § 274a.9; 28 C.F.R. pt. 68. At the end of this process, IRCA and its regulations carefully set civil and criminal sanctions for violations, including calibrated and graduated monetary penalties, fines, and civil injunctions against repeat offenders. 8 U.S.C. § 1324a(e)(4), (f); 8 C.F.R. § 274a.10(b). The ALJ's decision is subject to administrative appeal, then federal judicial review. 8 U.S.C. § 1324a(e)(7), (8).

In setting forth these detailed enforcement provisions—and vesting exclusive jurisdiction with the various federal agencies—Congress left no room for another sovereign to create its own system of enforcement. To the contrary, Congress expressly

preempted "any State or local law imposing civil or criminal sanctions" with respect to the employment of unauthorized aliens, parenthetically carving out only those sanctions based on "licensing and similar laws." 8 U.S.C. § 1324a(h)(2). As discussed further below and in the Petitioners' brief, Congress did not authorize—nor can the parenthetical saving clause be read as authorizing—an alternative state system of adjudication and enforcement.

Uniformity in enforcement is no less important than uniformity in the regulations themselves. In Arizona, for example, as noted above, if the federal government determines that an employee is authorized to work, that determination creates only a "rebuttable presumption" for purposes of the Arizona statute. Ariz. Rev. Stat. § 23-212(H). As Petitioners have explained, this provision flatly contradicts the federal statutory provisions that place the power to determine work authorization exclusively with federal officials. Pet. Br. 40. Moreover, if the federal determination is merely a rebuttable presumption, there will inevitably be situations where the federal and state determinations conflict, placing both employees and employers in an untenable situation.

When a federal statute seeks to create a uniform system, difficulties arise when dueling sovereigns act as unrelated decision-makers who may not approach issues consistently. Even if a State intends its laws only as a *complement* to the federal enforcement regime, the fundamental conflict remains. "The fact of a common end hardly neutralizes conflicting means." *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000). Indeed, one possible result of parallel enforcement is that "state and local laws would *overenforce* federal immigration law." Hiroshi

Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L. J. 1723, 1740 (2010) (case citations omitted) (emphasis added). The "facets of immigration law enforcement reflect complex, highly discretionary choices. It matters who allocates resources and picks enforcement targets and who balances enforcement goals against competing concerns." *Id*. at 1742-43. Congress's approach to these important and competing concerns—chiefly, serving immigration policy while preventing discrimination and minimizing burdens on business—is reflected not only in the statute itself but also in its careful delegation of the regulatory and enforcement functions to federal agencies; "law in the sense in which courts speak of it today does not exist without some definite authority behind it," *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 79 (1938), and discretionary enforcement choices are part and parcel of the exclusive federal scheme that governs this matter. Any parallel enforcement scheme would necessarily undermine Congress's goals.

C. IRCA's regulatory scheme is exceedingly complicated, underscoring the need to maintain exclusive federal control.

Complying with the federal system is no easy task. Indeed, the system is a maze of statutory provisions and regulations, described in federally issued handbooks and enforcement guides that are often themselves unable to capture the system's full complexity. While this complexity may be a necessary outgrowth of Congress's careful balancing act in this arena, it nevertheless poses challenges for employers, employees, and practitioners. Throwing state-specific regulations into the mix would greatly magnify

challenges like these, thus undermining Congress's express goals of ensuring uniformity and minimizing the burden on American business.

1. Government publications concerning the I-9 process acknowledge the difficulties employers and practitioners face. On May 31, 2005, the United States Citizenship and Immigration Services ("USCIS"), a division of DHS which inherited some of the functions of the former Immigration and Naturalization Service ("INS") under the 2003 Homeland Security Act, published a non-substantive revision of the I-9 form accompanied by instructions carrying both a prominent Anti-Discrimination Notice and strong warnings against violating employee civil rights in the employment eligibility verification process. The Reporting Burden note in the revised instructions acknowledges the difficulty of producing "forms and instructions that are accurate, can be easily understood and which impose the least possible burden on [the employer] to provide [DHS] with information * * * because *some immigration laws are very complex*." DHS, USCIS, Employment Eligibility Verification, Form I-9 (Rev. May 31, 2005) (emphasis added).

The uniform enforcement mechanisms of the federal system also reflect the system's complexity. To enforce IRCA, Congress created a new administrative court—the Office of the Chief Administrative Hearing Officer ("OCAHO") within the DOJ Executive Office for Immigration Review—to conduct *de novo* hearings in response to employer appeals from proposed civil money penalties levied by INS/DHS for knowing hiring and I-9 infractions, and to conduct *de novo* hearings on complaints of unlawful immigration-related discrimination brought

by the Special Counsel and/or aggrieved individuals or their representatives. These specialized tribunals apply their expertise to enforce the regulations consistently in cases throughout the country. That experience is critical not only to understanding the requirements employers face but even to determining whether a particular employee is authorized to work in the first place.

2. As noted above, even the most basic issues relating to work authorization are incredibly complex for immigrants, employers, and practitioners alike. Take, for example, the original INS rule published in 1987 to implement IRCA, which described the circumstances under which aliens would be authorized to work in the United States, and what kind of documentation would be needed to evidence particular forms of alien work authorization. There were 11 subcategories of aliens authorized to work "incident to status," 15 subcategories of aliens authorized to work *only for a particular* employer "incident to status," and 15 subcategories of aliens who were not work-authorized incident to status unless they were in possession of a work authorization document consistent with the requirements of the rules. See Appendix hereto, detailing the INS Rule, published May 1, 1987 at 52 Fed. Reg. 16216. That rule has been updated and amended through the agency rulemaking process over the years, see, *e.g.*, 60 Fed. Reg. 32472-01, 64 Fed. Reg. 6187-01, 72 Fed. Reg. 65974-01, 73 Fed. Reg. 76505-01, but the complexity of the various subcategories endures.

Under the federal system, an employer complies with its obligations not to employ an unauthorized worker simply by complying in good faith with the I-9

process. When, upon physical examination, the documents appear to the employer to be genuine and to relate to the individual, the employer must not look behind the documents to determine and understand the nature, circumstances, and extent of a particular employee's authorization to work. 8 U.S.C. § 1324a(b)(1)(A), 8 C.F.R. § 274a.2(b)(1)(ii)(A), (v).[7] In that fashion, the federal system endeavors to limit its burden on American business—as well as to prevent discrimination in employment.

But when a system like Arizona's is layered on top of this scheme, good-faith compliance with the I-9 process may no longer be sufficient. Ariz. Rev. Stat. §§ 23-212, 23-212.01. An employer may find itself defending its employment decisions in an enforcement proceeding where the employee's authorization to work under the above categories is ultimately adjudicated by *state* officials—perhaps consistently, and perhaps not, with how federal officials would resolve that issue. The employee himself may be long gone (or in federal custody), thus further complicating the employer's defense. To understand these issues, ask the necessary questions, and mount the necessary defense—all without running afoul of the anti-discrimination provisions of IRCA—would be incredibly difficult for any employer. This result is not consistent with Congress's goal of pursuing immigration policy with minimal burden on American business.

3. As noted above, determining work authorization is complex simply due to many

[7] However, an employer might have duties to investigate if the facts would place a reasonable person on notice that the worker's identity and/or work authorized status are in issue.

different categories of work authorization, and the different types of documentation required for each. See Appendix hereto; 8 C.F.R. § 274a.2(b)(1)(v); 52 Fed. Reg. 16216, at 16222 (1987). In addition, within particular classes there are further complexities, some of which are not evident on the face of the regulations.

One example lies in the federal agencies' handling of the work authorization rules governing foreign nationals accorded Temporary Protected Status ("TPS") under the Immigration Act of 1990. See 8 U.S.C. § 1254 *et seq*. Because TPS is country-specific (generally relating to natural disasters or political unrest in the country) and may involve tens or even hundreds of thousands of applications filed by nationals of a country within a short span of time, DHS has often issued a blanket extension of work authorization by publication in the Federal Register, rather than on an individual basis. In these cases, relying solely on the government-issued work authorization documents the employee presents may result in an employer's refusing to employ someone who does, in fact, have authorization to work.

Between 1999 and 2008, INS and DHS provided extension notices for TPS work authorization by Federal Register publication with respect to individuals from a variety of nations in Latin America. See, *e.g.*, Automatic Extension Notices of Temporary Protected Status and Work Authorization Status for registered nationals of El Salvador (71 Fed. Reg. 34637 (June 15, 2006), 68 Fed. Reg. 42071 (Jul. 16, 2003), 67 Fed. Reg. 46000 (Jul. 11, 2002)), Honduras (73 Fed. Reg. 57133 (Oct. 1, 2008), 69 Fed. Reg. 64084 (Nov. 3, 2004), 68 Fed. Reg. 23744 (May 5, 2003), 66 Fed. Reg. 23269 (May 8, 2001), 65 Fed. Reg.

36719 (June 9, 2000), 65 Fed. Reg. 30438 (May 71, 2000), 64 Fed. Reg. 524 (Jan. 5, 1999)), and Nicaragua (68 Fed. Reg. 23748 (May 5, 2003), 66 Fed. Reg. 23271 (May 8, 2001), 65 Fed. Reg. 30440 (May 71, 2000), 64 Fed. Reg. 526 (Jan. 5, 1999)). At various times, similar status and similar extensions were provided to individuals from Burundi, Somalia, Yugoslavia, Bosnia, and Liberia, among other nations. Typically, these notices state that employers were prohibited from refusing to accept INS or DHS employment authorization documents (Form I-688B) that bore a specified expiration date (or extension sticker punched for a specified expiration date) and contained the notation "274a.12(a)(11)" or "274a.12(a)(12)" on the face of the document under "Provision of Law," until the expiration date of the extension provided in the Federal Register.

Staying abreast of these developments is no easy task. And if employers face a state regulatory system as well, both the employers *and* the state regulators must remain conversant in the details of the Federal Register. Moreover, the employer may be forced to monitor the processes and decisionmaking of *state* enforcement bodies as well as federal ones, given that the state regulators' approach to this and other complex issues may, or may not, mirror the decisionmaking of the relevant federal agencies.

4. Yet another area of complexity arises in the context of students. Foreign students studying in the United States under F-1 visas can engage in Optional Practical Training ("OPT") and Curricular Practical Training ("CPT"). 8 C.F.R. § 214.2(f)(10). These work authorizations allow a student to work temporarily in a job related to his or her field of study. DHS requires all schools authorized to accept international

students to be approved by ICE's Student and Exchange Visitor Program ("SEVP"), and employment is authorized in different ways, some documented with an employment authorization document, and some simply notated by the school's Designated School Official ("DSO") in the Student and Exchange Visitor Information System ("SEVIS"). The federal government delegates certain authority to a DSO to authorize employment without prior DHS approval (as with on-campus employment and CPT). Even when there has been a violation of student status, the DSO can recommend and DHS can authorize reinstatement of status, which eliminates the previous violation. 8 C.F.R. § 214.2(f)(16).

For CPT employment authorization, a DSO must update a student's record in SEVIS and complete a SEVIS Form I-20 prior to the student's commencement of employment. 8 C.F.R. § 214.2(f)(10)(i)(B). For OPT employment authorization, students must apply for and receive a Form I-766 authorization document before beginning work. *Id*. § 214.2(f)(10)(ii). Generally, a student's lawful status remains current so long as he or she remains enrolled in school; if a student drops out of school, he may cease to be in lawful status, while retaining a genuine work authorization document that any employer may accept as permitting employment. There are separate categories for limited "on-campus" employment, as well as off-campus employment if the student can demonstrate severe economic hardship, but such categories are subject to yet another set of rules and procedures. 8 C.F.R. § 214.2(f)(9). During so-called "post-completion OPT"—which occurs after graduation—

students with a science, technology, engineering or mathematics ("STEM") degree may remain in the United States during OPT employment for 17 to 29 months after completing their studies. For such graduates, lawful status under the F-1 visa is "dependent upon employment," 8 C.F.R. § 214.2(f)(10)(2)(C)-(E), so the fact of employment actually drives lawful status, not the other way around. Accordingly, a person in this category who is inappropriately discharged by an Arizona employer may be required to return home, notwithstanding Congress's determination that the presence of such individuals benefits the United States.

In this context, subjecting employers and students to state regulation as well as federal regulation would impose additional burdens and interfere with the purposes underlying the federal scheme. The federal scheme balances multiple interests, including the cultural and educational benefits of welcoming foreign students to the United States, as well as the goodwill and economic benefit these workers offer to our nation as it strives to remain competitive in a global economy. Indeed, given the value of their particular skills to the U.S. economy, it is no coincidence that students in science, technology, engineering, and mathematics may extend their post-completion OPT more easily than students in other fields. Here again, attempts by States to impose their own regulations on this complex and comprehensive student employment process would only serve to interfere with federal objectives.

5. In sum, Congress has expressed a desire to serve its immigration policy goals while also preventing discrimination and avoiding burdens on business, and the uniformity of its regulation plays

an important part in that effort. Employers, employees, and practitioners alike currently maneuver through these complicated waters under the auspices of a single federal sovereign. But the carefully crafted federal body of regulation would quickly descend into imbalance and chaos if fifty-one independent sovereigns were each permitted to disrupt the existing system with widely varying systems and priorities of their own. With that in mind, it is no surprise that Congress intended to preempt those state regulatory efforts.

II. Principles of implied preemption apply here, notwithstanding the express statutory preemption provision and the limited saving clause.

For the reasons explained here and in Petitioners' brief, federal law preempts Arizona's statute, whether or not it fits within IRCA's very limited saving clause. Congress's express goal of uniformity—coupled with the complexity and comprehensive nature of this scheme—manifests its intention to preempt *any* competing state regulatory or enforcement scheme, whether the state scheme supplants or merely supplements the federal scheme.

"[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (citations omitted); see also *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 89, 115-116 (1992) (Souter, J., dissenting, joined by Blackmun, Stevens, and Thomas, J.J.) ("[W]hether the pre-emption at issue is described as occupation of each narrow field in which a federal standard has been promulgated, as pre-emption of those regulations that conflict with the

federal objective of single regulation, or * * * as express pre-emption, the key is congressional intent") (citation omitted).

The fact that Congress expressly reserved certain powers to the States does not compel the conclusion that the States' power in that sphere is unlimited. To the contrary, as this Court recognized in *Geier*, 529 U.S. at 871, "ordinary conflict pre-emption principles" apply notwithstanding the presence of an express preemption provision with a saving clause. And "this Court has repeatedly 'decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Id.* at 870 (quoting *United States* v. *Locke*, 529 U.S. 89, 106-107 (2000)) (internal citations omitted).[8]

Nor is there a "presumption against preemption" in this context, as the Ninth Circuit erroneously concluded. *Chicanos Por La Cause, Inc.*, v. *Napolitano*, 558 F.3d 856, 864 (9th Cir. 2009), *cert granted*, 130 S. Ct. 3498 (2010) (No. 09-115). This Court in *Geier* "specifically rejected the argument * * * * that the 'presumption against pre-emption' is relevant to the conflict pre-emption analysis." *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1228 (2009) (Alito, J., dissenting, joined by Roberts, C.J., and Scalia, J.).

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8 Cf. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 99 n.20, 104-06 (1983) (concluding that ERISA's broad preemptive language and legislative history manifested an intention to ensure substantial national uniformity, despite very limited exceptions to preemption written into the ERISA statute; "the combination of Congress' enactment of an all-inclusive pre-emption provision and its enumeration of narrow, specific exceptions to that provision makes us reluctant to expand § 514(d) into a more general saving clause").

Moreover, the presumption does not apply "when the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108; *cf. Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 508 (1988) ("unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can").

This Court has found implied conflict preemption both "where it is 'impossible for a private party to comply with both state and federal requirements'" *and* "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 64-65 (2002) (citations omitted); see also *Wyeth*, 129 S. Ct. at 1219 (Alito, J., dissenting, joined by Roberts, C.J., and Scalia, J.) ("the ordinary principles of conflict pre-emption turn solely on whether a State has upset the regulatory balance struck by the federal agency;" referring favorably to *Geier*, 529 U.S. at 869, 884-85).[9]

Here, as discussed above, the clear and manifest purpose of Congress was to make "combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman*, 535 U.S. at 147 (quoting *National Center for Immigrants' Rights*, 502 U.S. at 194 n.8). At the same time, Congress sought to

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9 Justice Alito's dissent in *Wyeth* also reiterated *Geier*'s conclusion that "'[t]he saving clause * * * does not bar the ordinary working of conflict pre-emption principles'" and that "'[t]he Court has * * * refused to read general 'saving' provisions to tolerate actual conflict both in cases involving impossibility and in 'frustration-of-purpose' cases.'" 129 S. Ct. at 1221 n.4 (quoting *Geier*, 529 U.S. at 869, 873-874 (emphasis deleted and citation omitted)).

regulate in a manner that was "uniform" and that minimized the burden on American business. See IRCA § 115, 100 Stat. at 3384.

Given these objectives, it is "incongruous" that "a Congress seeking uniformity * * * would intend to allow widely divergent state law." *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 230 (1986); see also Laurence Tribe, *American Constitutional Law* § 6-31, at 1210 (3d ed. 2000) ("If the field is one that is traditionally deemed 'national,' the Court is more vigilant in striking down what would amount to state incursions into subjects that Congress may have validly reserved to itself.") (citing, *inter alia*, *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982) ("recogniz[ing] the preeminent role of the Federal Government with respect to the regulation of aliens within our borders")); *cf. Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978) (plurality) (finding that "Congress intended [to establish] uniform national standards for design and construction" of tanker vessels, thus preempting more stringent state design requirements).

Given the express importance of uniformity in this sphere, it makes no difference whether the state's law is intended to supplant or merely to supplement the federal regulation. *Gade*, 505 U.S. at 104 n.2 (saving clause does not prevent implied preemption even where state law aims to supplement, rather than supplant, federal law) (citing *English* v. *General Elec. Co.*, 496 U.S. 72, 79-80 n.5 (1990)). As this Court has explained,

> where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation * * *

> states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail *or complement*, the federal law, *or enforce additional or auxiliary regulations.*

Hines v. *Davidowitz*, 312 U.S. 52, 66-67 (1941) (emphasis added). Indeed, where the purpose of a federal statute is to "make a harmonious whole" and regulate in "a single integrated and all-embracing system," even a *complementary* state scheme would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. at 67, 72, 74 (emphasis added).[10] That conclusion is particularly inescapable here, where the desire for uniformity is not merely *implied* from the scope of Congress's regulation but made *explicit* in the statute itself.

CONCLUSION

In light of the complex and intricate federal statutes, regulations, and agency procedures governing employment-related immigration law, and the daily practical realities for countless employers, employees, and practitioners who must comply with this carefully calibrated federal scheme, *Amici* urge this Court to reverse the decision of the Ninth Circuit and hold that the Legal Arizona Workers Act is preempted because it stands in conflict with the federal scheme and constitutes an obstacle to the

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10 Thus, the Arizona statute's provision forcing all employers to use the federal government's voluntary E-Verify system, Ariz. Rev. Stat. § 23-214, discussed in more detail by Petitioners and other amici, is still preempted, even if it "complement[s]" rather than "curtail[s]" the federal system. *Hines*, 312 U.S. at 66-67.

accomplishment and execution of the full purposes and objectives of Congress.

Respectfully submitted.

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APPENDIX

Under the original INS rule implementing IRCA, 52 Fed. Reg. 16216, published on May 1, 1987, aliens who could work incident to status included:

> (1) An alien who is a lawful permanent resident (with or without conditions pursuant to section 216 of the Act), as evidenced by Form I-151 or Form I-551 issued by the Service;
>
> (2) An alien admitted to the United States as a lawful temporary resident pursuant to section 245A or 210 of the Act, as evidenced by an employment authorization document issued by the Service;
>
> (3) An alien admitted to the United States as a refugee pursuant to section 207 of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service;
>
> (4) An alien paroled into the United States as a refugee for the period of time in that status, as evidenced by an employment authorization document issued by the Service;
>
> (5) An alien granted asylum under section 208 of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

(6) An alien admitted to the United States as a nonimmigrant fiancé or fiancée pursuant to section 101(a)(15)(K) of the Act, or an alien admitted as the child of such alien, for the period of admission of the United States, as evidenced by an employment authorization document issued by the Service;

(7) An alien admitted as a parent (N-8) or dependent child (N-9) of an alien granted permanent residence under section 101(a)(27)(I) of the Act, as evidenced by an employment authorization document issued by the Service;

(8) An alien admitted to the United States as a citizen of the Federated States of Micronesia (CFA/FSM) or of the Marshall Islands (CFA/MIS) pursuant to agreements between the United States and the former trust territories, as evidenced by an employment authorization document issued by the Service;

(9) An alien granted suspension of deportation under section 244(a) of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service;

(10) An alien granted withholding of deportation under section 243(h) of the Act for the period of time in that status,

as evidenced by an employment authorization document issued by the Service; or

(11) An alien who has been granted extended voluntary departure by the Attorney General as a member of a nationality group pursuant to a request by the Secretary of State. Employment is authorized for the period of time in that status as evidenced by Form I-9 issued by the Service.

Aliens who can work incident to status but only for a particular employer include:

(1) A foreign government official (A-l or A-2), pursuant to 8 C.F.R. § 214.2(a). An alien in this status may be employed only by the foreign government entity;

(2) An employee of a foreign government official (A-3), pursuant to 8 C.F.R. § 214.2(a). An alien in this status may be employed only by the foreign government official;

(3) A foreign government official in transit (C-2 or C-3), pursuant to 8 C.F.R. § 214.2(c). An alien in this status may be employed only by the foreign government entity;

(4) A nonimmigrant crewman (D-I or D-2) pursuant to § 214.2(d), and 8 C.F.R. Parts 252 and 253. An alien in this status may be employed only in a crewman capacity on the vessel or aircraft of arrival, or on a vessel or

aircraft of the same transportation company, and may not be employed in connection with domestic flights or movements of a vessel or aircraft;

(5) A nonimmigrant treaty trader (E-1) or treaty investor (E-2), pursuant to 8 C.F.R. § 214.2(e). An alien in this status may be employed only by the treaty-qualifying company through which the alien attained the status. Employment authorization does not extend to the dependents of the principal treaty trader or treaty investor (also designated "E-1" or "E-2"), other than those specified in paragraph (c)(2) of this section;

(6) A nonimmigrant student (F-l) pursuant to 8 C.F.R. § 214.2(f)(9). An alien in this status may be employed only in accordance with the following conditions:

(i) On campus for not more than twenty hours a week while school is in session; or

(ii) On campus full time when school is not in session if the student is eligible and intends to register for the next term or session. In addition, a nonimmigrant student (F-l) may engage in a work-study program as part of the regular curriculum available within the student's program of study in accordance with the conditions specified in 8 C.F.R. § 214.2(f)(l0);

(7) A representative of an international organization (G-1, G-2, G-3, or G-4), pursuant to 8 C.F.R. § 214.2(g). An alien in this status may be employed only by the foreign government entity or the international organization;

(8) A personal employee of an official or representative of an international organization (G-5), pursuant to 8 C.F.R. § 214.2(g). An alien in this status may be employed only by the official or representative of the international organization;

(9) A temporary worker or trainee (H-1, H-2A, H-2B, or H-3), pursuant to 8 C.F.R. § 214.2(h); An alien in this status could be employed only by the petitioner through whom the status was obtained;

(10) An information media representative (I), pursuant to 8 C.F.R. § 214.2(i). An alien in this status may be employed only for the sponsoring foreign news agency or bureau. Employment authorization does not extend to the dependents of an information media representative (also designated "I");

(11) An exchange visitor (J-1), pursuant to 8 C.F.R. § 214.2(j). An alien in this status may be employed only by the exchange visitor program sponsor or appropriate designee and within the guidelines of the program approved by the United States Information Agency;

(12) An intra-company transferee (L-l), pursuant to 8 C.F.R. § 214.2(1). An alien in this status may be employed only by the petitioner through whom the status was obtained;

(13) Officers and personnel of the armed services of nations of the North Atlantic Treaty Organization, and representtatives, officials, and staff employees of NATO (NATO-1, NATO-2, NATO-3, NATO-4, NATO-5 and NATO-6), pursuant to 8 C.F.R. § 214.2(o). An alien in this status may be employed only by NATO;

(14) An attendant, servant or personal employee (NATO-7) of an alien admitted as a NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, or NATO-6, pursuant to 8 C.F.R. § 214.2(o). An alien admitted under this classification may be employed only by the NATO alien through whom the status was obtained; or

(15) A nonimmigrant alien within the class of aliens described in paragraphs (b)(9), (11), and (12) of this section whose status has expired but who has filed a timely application for an extension of such status pursuant to 8 C.F.R. § 214.2. These aliens are authorized to continue employment with the same employer for a period not to exceed 120 days beginning on the date of the expiration of the authorized period of stay. If the

> alien's application for extension of stay has not been adjudicated within this period, the alien may apply to the district director for employment authorization pursuant to paragraph (c)(15) of this section.

Aliens who could work incident to status but only with an INS work authorization document included:

> (1) An alien spouse or unmarried dependent son or daughter of a foreign government official (A-l or A-2) pursuant to 8 C.F.R. § 214.2(a)(2), or the dependent of an employee of a foreign government official (A-3) pursuant to § 214.2(a)(3);
>
> (2) An alien spouse or unmarried dependent son or daughter of an alien employee of the Coordination Council for North American Affairs (E-l) pursuant to 8 C.F.R. § 214.2(e);
>
> (3) A nonimmigrant (F-1) student who:
>
> > (i) Is seeking off-campus employment authorization due to economic necessity pursuant to 8 C.F.R. § 214.2(1);
> >
> > (ii) Is seeking employment for purposes of practical training pursuant to 8 C.F.R. § 214.2(1). The alien may be employed only in an occupation which is directly related to his or her course of studies; or
> >
> > (iii) Has been offered employment under the sponsorship of an

international organization within the meaning of the International Organization Inununities Act (59 Stat. 669), if such international organization provides written certification to the district director having jurisdiction over the intended place of employment that the proposed employment is within the scope of the organization's sponsorship;

(4) An alien spouse or unmarried dependent son or daughter of an officer or employee of an international organization (G-4) pursuant to C.F.R. § 214.2(g);

(5) An alien spouse or minor child of an exchange visitor (J-2) pursuant to 8 C.F.R. § 214.2(j);

(6) A nonimmigrant (M-1) student seeking employment for practical training pursuant to 8 C.F.R. § 214.2(m) following completion of studies if such employment is directly related to the student's course of study;

(7) A dependent of an alien classified as NATO-I through NATO-7 pursuant to 8 C.F.R. § 214.2(n);

(8) Any alien who has filed a non-frivolous application for asylum pursuant to 8 C.F.R. Part 208. Employment authorization shall be granted in increments not exceeding one year during the period the application is

pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

(9) Any alien who has filed an application for adjustment of status to lawful permanent resident pursuant to 8 C.F.R. Part 245. Employment authorization shall be granted in increments not exceeding one year during the period the application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

(10) Any alien who has filed an application for suspension of deportation pursuant to 8 C.F.R. Part 244, if the alien establishes an economic need to work. Employment authorization shall be granted in increments not exceeding one year during the period the application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date;

(11) Any alien paroled into the United States temporarily for emergent reasons or reasons deemed strictly in the public interest pursuant to 8 C.F.R. § 212.5;

(12) Any deportable alien granted voluntary departure, either prior to or after hearing, for reasons set forth in 8 C.F.R. § 242.5(a)(2) (v), (vi), or (viii) may

be granted permission to be employed for that period of time prior to the date set for voluntary departure including any extension granted beyond such date. Factors which may be considered in adjudicating the employment application of an alien who has been granted voluntary departure are the following:

(i) The length of voluntary departure granted;

(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support;

(iii) Whether there is a reasonable chance that legal status may ensue in the near future; and

(iv) Whether there is a reasonable basis for consideration of discretionary relief.

(13) Any alien against whom exclusion or deportation proceedings have been instituted, who does not have a final order of deportation or exclusion, and who is not detained may be granted temporary employment authorization if the district director detennines that employment is appropriate. Factors which may be considered by the district director in adjudicating the employment application of such an alien are the following:

(i) The existence of the economic necessity to be employed;

(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support;

(iii) Whether there is a reasonable chance that legal status may ensue in the near future; and

(iv) Whether there is a reasonable basis for consideration of discretionary relief;

(14) An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment; and

(15) A nonimmigrant alien within the class of aliens described in paragraphs (b)(9), (11), and (12) of this section whose application for extension of stay has not been adjudicated within the 120-day period as set forth in paragraph (b)(15) of this section.