

Nos. 07-17272, 07-17274, 08-15357, 08-15359, 08-15360

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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

v.

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

*and consolidated cases*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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**BRIEF OF *AMICUS CURIAE*  
AMERICAN UNITY LEGAL DEFENSE FUND, INC.  
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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## **CORPORATE DISCLOSURE STATEMENT**

*Amicus* American Unity Legal Defense Fund is not a publicly traded corporation. There are no parent corporations or other publicly held corporations that own 10% or more of *amicus*.

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## STATEMENT OF INTEREST

*Amicus curiae* American Unity Legal Defense Fund (“AULDF”) is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century. [www.americanunity.org](http://www.americanunity.org). AULDF has filed *amicus* briefs in recent cases, including *Mohawk Industries v. Williams*, 547 U.S. 1075 (2006), and *Crawford v. Marion County Election Board*, Nos. 07-21, 07-25, \_\_ U.S. \_\_\_, 2008 WL 1848103, April 28, 2008.

On April 21, 2007, all parties to this case, through counsel, consented to the filing of this brief. Fed. R. App. P. 29(a).

AULDF will not repeat the preemption and constitutional analyses in Appellees’ Opening Brief, with which it agrees. AULDF offers this brief to make three points not made by any party thus far:

- a) contrary to an assertion by some *amici curiae*, at least some Appellants and *amici* are opposed to limits on hiring illegal immigrants;
- b) immigration law enforcement has collapsed in the last decade; and
- c) Congress did not intend administrative enforcement of 8 U.S.C. § 1324a to be the exclusive civil enforcement mechanism against employers of illegal immigrants, as shown by its 1996 amendment of

8 U.S.C. § 1324(a)(3)(A) and related amendments to federal racketeering laws to provide for private law enforcement of penalties against employers of illegal immigrant workers.

### **PRELIMINARY STATEMENT**

*Contrary to much of the rhetoric that has been bandied about in the immigration debate, amici do not support the knowing employment of illegal immigrants. It is against federal law to knowingly employ illegal workers, and employers who disregard this stricture are subject to an exclusive (and extensive) federal system of administrative adjudication and penalty. The efficacy and wisdom of that choice, which Congress made more than 20 years ago, is not at issue here.*

Brief of *Amici Curiae* The Oklahoma State Chamber of Commerce and Associated Industries, [et al.], (“State Chambers’ Br.”), P. 4 (emphasis added).

The statement above – and particularly the claim that “*amici* do not support the knowing employment of illegal immigrants” – is disingenuous at best. The obvious refutation<sup>1</sup> provides vital context for this case. Employers’ current attitudes toward the hiring of illegal immigrant workers have been shaped by ten

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<sup>1</sup>“To do otherwise leaves the court open to the criticism that it is denying the obvious until an objective observer cries out that ‘the emperor has no clothes.’” *Moore v. City of Harriman*, 272 F.3d 769, 775 (6<sup>th</sup> Cir. 2001)(Gilman, J., concurring), quoting, Hans Christian Andersen, *The Emperor's New Clothes*, in *The Little Mermaid and Other Fairy Tales* (1963).

years of non-enforcement of the federal laws on employment of illegal immigrants (explained in more detail below).

Many of the plaintiffs and *amici* in this case are no different. Their purpose in this case, as in efforts elsewhere, is to continue to employ illegal immigrant workers. “Plaintiffs now reach beyond asking for protection from imminent government action and instead are demanding a binding adjudication that absolves them from the legal effect of the Act.” *Ariz. Contractors Ass’n, et al. v. Napolitano, et al.*, slip op., at \*4, 20007 WL 4570303 (D.Ariz. Dec. 21, 2007).

Why? These employers make no secret of their views: these illegal immigrant workers are “essential.” In 2004, Plaintiff U.S. Chamber of Commerce, for example, issued a press release on then-pending federal legislation which said:

There could be as many as 10 million illegal immigrants in the United States, by some estimates. Many of these are undocumented and unskilled workers who fill *essential* jobs in our economy that otherwise would go empty. A steady and available labor force is *essential* for a growing and prosperous economy.

U.S. Chamber of Commerce, “Chamber Welcomes Bipartisan Debate on Immigration Reform,” Jan. 21, 2004, [www.uschamber.com/press/releases/2004/january/04-06.htm](http://www.uschamber.com/press/releases/2004/january/04-06.htm) (emphasis added).

The “Essential Worker Immigration Coalition” (“EWIC”), a project of Plaintiff U.S. Chamber of Commerce,<sup>2</sup> says more plainly: “Employers can not afford the disruption in the workplace that would surely occur if an estimated 11 million migrants (5% of the workforce) were required to return to their home country.” EWIC, “Why A Mandatory Return, ‘Report To Deport,’ Policy Is Not The Best Option,” undated, [www.ewic.org/index.php?option=com\\_content&task=view&id=47&Itemid=9](http://www.ewic.org/index.php?option=com_content&task=view&id=47&Itemid=9).

With this justification, these activists are not content to leave the issue as settled “more than 20 years ago.” State Chambers’ Br., 4. “Businesses are pushing back against the law, even as they scramble to comply with it. ‘It’s crystal-clear that the employer sanctions law will harm the state economy,’ says Glenn Hamer, president of [Plaintiff] the Arizona Chamber of Commerce and Industry.” Miriam Jordan, “Arizona Squeeze on Immigration Angers Business,” *Wall Street Journal*, Dec. 14, 2007, B1,

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<sup>2</sup>EWIC’s e-mail address is [ewic@uschamber.com](mailto:ewic@uschamber.com). [www.ewic.org](http://www.ewic.org). EWIC includes several Plaintiffs and *amici*. *Id.* On April 16, 2008, 400 illegal immigrant workers were arrested at a worksite of Pilgrim’s Pride, Inc., an EWIC member. Miriam Marcus, “Pilgrim’s Pride Plucked in Immigration Raids,” *Forbes*, April 16, 2008, [www.forbes.com/markets/2008/04/16/pilgrims-pride-immigrant-markets-equity-cx\\_mlm\\_0416market36.html](http://www.forbes.com/markets/2008/04/16/pilgrims-pride-immigrant-markets-equity-cx_mlm_0416market36.html). “‘We share the government’s goal of eliminating the hiring or employment of unauthorized workers,’ the company said.” *Id.*

<http://www.azcentral.com/arizonarepublic/business/articles/1214biz-ArizImmigration1214-ON.html>.

Seven weeks after the collapse of comprehensive immigration reform in the Senate, the Bush administration is shifting to a plan the president once said could not work: stepped up enforcement of existing laws. What concerns many of the nation's businesses and farms that use undocumented labor is that it might work all too well. "It's going to hurt my members and be terrible for the economy," says Craig Silvertooth, director of federal affairs for [Plaintiff] the National Roofing Contractors Association.

Gail Russell Chaddock, "US crackdown on hiring illegals irks business community," *Christian Science Monitor*, Aug. 14, 2007, [www.csmonitor.com/2007/0814/p03s03-uspo.html](http://www.csmonitor.com/2007/0814/p03s03-uspo.html).

If their true intentions are so easily uncovered, why did *amici* include the statement that "Contrary to much of the rhetoric that has been bandied about in the immigration debate, *amici* do not support the knowing employment of illegal immigrants"? State Chambers' Br., 4. Possibly because discussing the current state of immigration law enforcement would have a substantial impact on the issues before this Court. This case cannot be decided without examining its context: the complete collapse of immigration law enforcement in the interior of the United

States and the concomitant preferential hiring of illegal immigrant workers (to the detriment of low-income Americans).

The court below hinted at this possibility: “[I]t is hard to see how state employer sanctions provisions that are carefully drafted to track the federal employer sanctions law can be inconsistent with it – unless we take ineffective enforcement to be the ‘real’ federal policy from which state law must not deviate.” *Ariz. Contractors Ass’n v. Candelaria*, 534 F.Supp.2d 1036, 1055 (D.Ariz. 2008), quoting, Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U.CHI.LEGAL F., 57, 79-80 (2007).

Yet, as shown below, the “real” federal immigration enforcement policy against employers is just as the lower court warned: ineffective. For example, as shown in more detail below, the number of workplace arrests and immigration fines against employers declined 99% between 1996 (when Congress authorized private law enforcement against employers of illegal immigrants) and 2005. *See*, chart *infra*, at P. 14. Employers are well-aware of that lack of effective enforcement, and that ineffectiveness has a major bearing on this case.

## **SUMMARY OF ARGUMENT**

Federal immigration law enforcement in the workplace has collapsed in the last decade. Some blame document fraud for the problem, but the collapse has

deeper roots. Despite federal officials' public statements about the need to punish employers, the actual number of workplace arrests and fines declined by more than 99% between Fiscal Years 1996 and 2005. Even a recent touted enforcement increase in 2007 resulted in workplace arrests totaling less than a third of the number of arrests made in 1997.

Employers were well-aware of the lack of interior immigration law enforcement; some responded by blocking enforcement, and others by scheming to violate the law. Wal-Mart Stores, for example, engaged in a comprehensive national scheme to continue to hire illegal immigrant workers, directly and through contractors, even after a highly-publicized federal consent decree and an \$11 million fine. Wal-Mart, which is not part of this case, is only one example of a nationwide pattern of employers willfully and knowingly violating the prohibition against hiring illegal immigrants.

Across the nation, employers preferentially hired illegal immigrants, and the result was a lowering of wages and depression of working conditions for American workers. Studies show that most of the net gains in American employment have been "captured" by immigrant workers, until one out of every seven workers in America in 2004 was foreign-born, up from one in ten workers a decade before. The effect falls most heavily on low-income American workers.

The net effect of adopting Appellants' position would be to decree exactly what the District Court below warned about: "we take ineffective enforcement to be the 'real' federal policy from which state law must not deviate." *Ariz. Contractors Ass'n v. Candelaria*, 534 F.Supp. 2d at 1055. That position is inconsistent with expressed Congressional intent, and cannot be the basis for preemption.

In addition, such a position would be inconsistent with Congressional intent in 1996 when it enacted a private right of action against employers of illegal immigrants. Plaintiffs and their supporters claim that 8 U.S.C. 1324a was intended to be an exclusive remedy against employers of illegal immigrant workers; they ignore the immediately-preceding statutory provision, 8 U.S.C. 1324, for example, which provides a private right of action against employers of illegal immigrants. In 1996, Congress amended both the Racketeer Influenced and Corrupt Organizations ("RICO") statute and the Immigration and Nationality Act to make employing multiple illegal immigrant workers a RICO predicate crime. Several Circuits, including this one, have permitted American workers to sue their employers for knowingly hiring illegal immigrants. *See, e.g., Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9<sup>th</sup> Cir. 2002).

Appellants and *amici* argue that Congress sought to “balance” business efficiency in its penalties for employers of illegal immigrants; Appellees dispute the extent of this “balance” in an area where Congress expressly permitted state “licensing and similar” regulation of employers of illegal immigrants. But Congress had no such business efficiency purposes in mind in 1996 when it expanded RICO to provide treble damages to private litigants. Congress sought to protect American workers and the immigrants themselves from the evils associated with illegal immigration. It would be odd to say that individuals have a private right to punish employers of illegal immigrant workers, but that states cannot pass “licensing or similar” statutes to do the same thing. It would be similarly odd to say, as Appellants and their *amici* do, that the Section 1324a system is intended to provide an exclusive administrative process for penalizing those who hire illegal immigrants, when RICO remedies can be brought by private citizens in state courts.

## ARGUMENT

### **I. INTERIOR IMMIGRATION LAW ENFORCEMENT HAS COLLAPSED, AND THE IMPACT OF EMPLOYERS' RESULTANT PREFERENTIAL HIRING OF ILLEGAL IMMIGRANTS FALLS MOST HEAVILY ON LOW-INCOME AMERICANS.**

#### **A. Interior Immigration Law Enforcement Has Collapsed.**

It is the expressed position of the federal government to stop the hiring of illegal immigrants. “We’ve got to crack down on employers who flout our laws.” “President Signs Homeland Security Appropriations Act for 2006,” Oct. 2005, 4, [www.whitehouse.gov/news/releases/2005/10/20051018-2.html](http://www.whitehouse.gov/news/releases/2005/10/20051018-2.html).

In the Immigration Reform and Control Act of 1986, Congress prohibited the hiring of unauthorized aliens (“employer sanctions”). 8 U.S.C. § 1324a.

As we have previously noted, IRCA “forcefully” made combating the employment of illegal aliens central to “[t]he policy of immigration law.” *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, and n. 8, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991). It did so by establishing an extensive “employment verification system,” § 1324a(a)(1), designed to deny employment to

aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, § 1324a(h)(3).

*Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147-48 (2002).

The District Court below noted in passing that “the I-9 [employment verification] system has been thoroughly defeated by document and identity fraud, allowing upwards of eleven million unauthorized workers to gain employment in the United States labor force, with the number increasing at about a half a million a year. (Facts. Doc. #149, Ex. 15 at 1-3).” 534 F.Supp.2d at 1043.<sup>3</sup>

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<sup>3</sup>The District Court’s view is amply supported by other analyses. As the House Judiciary Committee noted in 1996, “enforcement of employer sanctions has been beset by difficulty from the start.” Comm. on the Judiciary, “Immigration in the National Interest Act,” H. Rpt. 104-469, Mar. 4, 1996, at 129. One of the principal authors of the 1986 IRCA, former Senator Alan Simpson, recently testified before the House Judiciary Committee that:

The records of Republican and Democratic Administrations since 1986 are equally deficient in addressing the obvious problem of document fraud. Bureaucratic turf battles prevented the more effective use of the Social Security Card or the Social Security Account Number. The INS soon grew tired of pursuing employers for I-9 violations, since fraudulent documents defeated the system with such ease. The Justice Department did not make prosecution of document fraud a priority, so any likelihood that a documents vendor would be “caught” was quite remote. Presidents failed to even speak to the Nation about the serious problems that can occur when a country such as ours has porous borders and insecure identity documents.

Comm. on the Judiciary, “Is the Reid-Kennedy Bill a Repeat of the Failed Amnesty of 1986?” H. Rpt. 109-142, Sept. 1, 2006, at 20.

Employers, as well as others, have willingly participated in this document fraud: “Hundreds of thousands of aliens unauthorized to work in the United States have used fraudulent documents to circumvent the process designed to prevent employers from hiring them. In many instances, employers are complicit in this activity.” U.S. General Accounting Office, *Homeland Security: Challenges to Implementing the Immigration Interior Enforcement Strategy*, April 10, 2003, GAO-03-660T, 5-6.

There are, however, other reasons besides document fraud for the continuing presence of illegal immigrant workers in such large numbers, including an almost total lack of immigration law enforcement in the interior of the United States. As a result, the reality of worksite immigration enforcement is substantially different from the rhetoric:

The worksite enforcement program is one of various ICE [U.S. Bureau of Immigration and Customs Enforcement] immigration enforcement programs, and has been a relatively low priority. Since fiscal year 1999, the number of notices of intent to fine issued to employers for violations of IRCA [8 U.S.C. § 1324a] and the number of administrative worksite arrests have *declined*. . .

U.S. Government Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, (“*Immigration Enforcement*”), August 2005, GAO-05-813, at 30 (emphasis added).

GAO’s bland language masks the true extent of the “decline[.]” Between 1996 and 2005, there was a “decline” of 99.1% in workplace arrests for violations of the prohibitions on hiring illegal immigrants, and a “decline” of 99.7% in issuance of penalties to employers.

Simply put, employer sanctions enforcement has collapsed in the last decade. Here are the actual workplace immigration law enforcement statistics:

Fiscal Year	Worksite Arrests	Notices of Intent to Fine
1997	17,554	865
1998	13,914	1,023
1999	2,849	417
2000	953	178
2001	735	100
2002	485	53
2003	445	162
2004	159	3
2005 (7 months)	81	N/A
2006	4,383	N/A
2007	4,940	N/A

1997-98 data: U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, Table 39. 1999-2005 data: *Immigration*

*Enforcement, supra*, 35, 36, Figures 4 and 5. 2006-2007 data from Immigration and Customs Enforcement, “Fact Sheet: Worksite Enforcement,” Oct. 15, 2007, [www.ice.gov/pi/news/factsheets/worksite.htm](http://www.ice.gov/pi/news/factsheets/worksite.htm).

Part of the decline in notices to fine is because the federal government has found such notices to be ineffective. “In the past, administrative fines often proved to hold little deterrence value for violators. Many employers came to view these fines as simply the ‘cost of doing business.’ Administrative fines were ignored, not paid in a timely manner or mitigated down over several years.” *Id.*

After the failure of recent legislative efforts to reform immigration laws, federal authorities announced they would ramp up enforcement efforts. “U.S. Immigration and Customs Enforcement (ICE) dramatically enhanced its efforts to combat the unlawful employment of illegal aliens in the United States.” *Id.* As the chart above shows, however, the reported 4,900 workplace arrests of illegal immigrants in 2007, out of a population estimated at greater than 10,000,000, is still less than a third of the 17,554 workplace arrests made ten years before.

**B. The Collapse of Immigration Law Enforcement Is No Secret to Employers.**

This collapse has been public knowledge for several years. Louis Uchitelle, “I.N.S. Is Looking the Other Way As Illegal Immigrants Fill Jobs,” *The New York*

*Times*, March 9, 2000, C1, col. 1,

<http://select.nytimes.com/gst/abstract.html?res=FB0E1FFE345C0C7A8CDDAA0894D8404482>.

Employers know that they are unlikely to suffer adverse consequences from hiring illegal immigrants:

The impact [of increased immigration law enforcement] on immigrant-dependent industries such as construction and agriculture – whose workforce is at least two-thirds illegal – would be “devastating,” predicted Craig Regelbrugge, government relations director for the American Nursery & Landscape Association. “There’s no replacement workforce,” he said. “This will give people a set of bad choices: Either they terminate their workers, or they take a deep breath and duck and hope the law doesn’t catch up to them.”

N.C. Aizenman, “Bush Moves to Step Up Immigration Enforcement, *Washington Post*, August 11, 2007, A1, [www.washingtonpost.com/wp-dyn/content/article/2007/08/10/AR2007081001113\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/08/10/AR2007081001113_pf.html).

Actually, the real situation is much worse than Mr. Regelbrugge predicted. Rather than just hoping not to be caught, some employers are taking a more direct approach to blocking immigration law enforcement:

Shortly before Thanksgiving last year, Tom Nassif did something few law-abiding citizens would ever think to do: He called the U.S. Border Patrol here [Yuma, Arizona] and suggested agents stop manning a highway checkpoint intended to keep illegal immigrants out of the country. A former U.S. ambassador and currently the president of a powerful farming association, Mr. Nassif told officials that the agency couldn't have picked a worse time to beef up enforcement. Didn't they know it was lettuce season? . . . Shortly after [the] Western Growers [Association] issued the public protest in late November, the checkpoint on I-8 was closed.

Miriam Jordan, "Crucial Ingredient: As Border Tightens, Growers See Threat to 'Winter Salad Bowl'", *Wall Street Journal*, Mar. 11, 2005, A1, <http://online.wsj.com/article/SB111050941849076904.html?mod=home%255Fpage%255Fone%255Fus>.

The lower cost of the illegal immigrant labor pool gives employers who can't block enforcement like the Western Growers Association a huge economic incentive to break the immigration laws. Some major, high-profile employers repeatedly and knowingly hire illegal immigrants.

One significant recent example is Wal-Mart Stores, Inc., the focus of recent federal prosecutions for hiring illegal immigrant workers.<sup>4</sup> Federal officials tout the recent consent decree entered against Wal-Mart Stores, Inc., and several contractors who conspired with Wal-Mart executives<sup>5</sup> to hire illegal immigrants as

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<sup>4</sup>Many of the allegations raised against Wal-Mart Stores are set forth in a District Court opinion, which, in part, dismissed without prejudice RICO claims filed by some of the illegal immigrant workers who allegedly were involved in the case. *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295, 300-311 (D.N.J. 2005). Judge Greenaway denied the RICO claims, in part, because the complaint did not allege that Wal-Mart had actual knowledge that the aliens were brought into the United States in violation of law. *Id.*, 393 F.Supp.2d at 309. After the Mullin affidavit, *supra*, was unsealed, the plaintiffs in *Zavala* submitted a Second Amended Complaint with more allegations about Wal-Mart's actual knowledge that its subcontractors were hiring illegal immigrants.  
[www.walmartjanitors.com/staticdata/Second\\_Amended\\_Complaint.pdf](http://www.walmartjanitors.com/staticdata/Second_Amended_Complaint.pdf).

<sup>5</sup>“Walters stated that in approximately March 1997, due to an INS worksite operation conducted on several Wal-Mart stores located in the St. Louis area, Wal-Mart fired IMC [Walter's company] as a cleaning contractor. Walters stated that Mr. Leroy Schuetz, then Division Vice-President, Operations Branch at Wal-Mart Headquarters, informed him that IMC was fired because they used illegal aliens as their cleaning crews. . . .Walters further stated that Schuetz told him to create different companies if he [Walters] wanted to do business with Wal-Mart again. Schuetz explained that if Walters created different companies and if one company was fired for employing illegal aliens, Walters could continue to do business with Wal-Mart through other companies.”  
Affidavit of Patricia M. Mullin, Acting Special Agent in Charge of United States Immigration and Customs Enforcement (“Mullin Aff.”), *attached* to Application and Affidavit for Search Warrant, *In the Matter of the Search of David Glass Drive Technology Center, Wal-Mart Corporation*, Case Number FA-03-23, filed October 22, 2003, U.S. District for the Western District of Arkansas, at 41-42, available at: [www.walmartjanitors.com/staticdata/Exhibit\\_A\\_to\\_SAC.pdf](http://www.walmartjanitors.com/staticdata/Exhibit_A_to_SAC.pdf).

“the two most significant enforcement actions taken by the United States in the field of immigration employment sanctions since the laws prohibiting employment of illegal aliens were first enacted in 1986.”<sup>6</sup>

This announcement, however, illustrates much more, including how a major corporation knowingly, willfully and repeatedly hired illegal immigrants even after being prosecuted. The investigation was triggered in 1998, by a hit-and-run accident in Honesdale, Pennsylvania.<sup>7</sup> A license plate, left at the scene, *id.*, led local law enforcement officials to investigate whether illegal immigrants were working at a local Wal-Mart store.<sup>8</sup> Finally, in 2001, federal agents raided Wal-Mart stores in Pennsylvania, New York, Ohio and Missouri, and arrested approximately 100 illegal immigrants. ICE News Release, *supra*.

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<sup>6</sup> Office of Public Affairs, U.S. Immigration and Customs Enforcement, “ICE, Wal-Mart Reach \$11 Million Settlement”, *Inside ICE*, March 18, 2005, (“ICE News Release”), [www.ice.gov/pi/news/insideice/articles/insideice\\_032805\\_web2.htm](http://www.ice.gov/pi/news/insideice/articles/insideice_032805_web2.htm)

<sup>7</sup>Michael Barbero, “Wal-Mart to Pay \$11 Million,” *The Washington Post*, March 19, 2005, B1, [www.washingtonpost.com/ac2/wp-dyn/A48612-2005Mar18?language=printer](http://www.washingtonpost.com/ac2/wp-dyn/A48612-2005Mar18?language=printer).

<sup>8</sup>Chris Strohm, “DHS Calls on Corporations to Come Clean on Hiring Illegal Immigrants,” *GovExec.com Daily Briefing*, March 18, 2005, [www.govexec.com/story\\_page.cfm?articleid=30800](http://www.govexec.com/story_page.cfm?articleid=30800).

Nevertheless, Wal-Mart continued using contractors who hired illegal immigrants. On October 23, 2003, ICE agents arrested approximately 245 illegal immigrant workers at some 60 Wal-Mart stores in 21 states. *Id.*

Wal-Mart executives first denied knowing that their contractors and stores were using illegal immigrant workers, but further investigation revealed that “recorded conversations of unidentified Wal-Mart executives, managers and contractors showed that immigration violations ‘continued to occur with direct knowledge by the Wal-Mart corporation.’”<sup>9</sup>

Even prosecution and the consent decree do not appear to have deterred Wal-Mart executives.<sup>10</sup> Only seven months after the touted consent decree, Wal-

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<sup>9</sup>Jerry Seper, “Wal-Mart Pays \$11 Million to Settle Alien Case,” *The Washington Times*, March 19, 2005, [www.washingtontimes.com/function/print.php?StoryID=20050318-104421-2951r](http://www.washingtontimes.com/function/print.php?StoryID=20050318-104421-2951r). *See also,*

<sup>10</sup>These limited prosecutions involved only a total of about 345 illegal immigrant workers out of a Wal-Mart domestic workforce of 1,200,000 workers. Associated Press, “Wal-Mart Mops Up Immigrant Flap,” CBS News.com, March 18, 2005, [www.cbsnews.com/stories/2005/03/18/national/printable681593.shtml](http://www.cbsnews.com/stories/2005/03/18/national/printable681593.shtml). And the fine is an insignificant financial event for the world’s largest retailer. “[F]or Wal-Mart, which made \$289 billion in retail sales last year, it will take about 16 hours of sales to pay it off.” Seper, *supra*.

Mart again was caught using hundreds of illegal immigrants, in Pennsylvania and North Dakota.<sup>11</sup>

Of course, Wal-Mart is not a party in this case, and most American companies do not knowingly hire illegal immigrant workers. Yet many cases indicate that the Wal-Mart case is not an isolated or aberrant instance. *See, e.g., Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *Baker v. IBP, Inc.*, 357 F.3d 685, 686-87 (7<sup>th</sup> Cir. 2004), *cert. denied*, 543 U.S. 956 (2004) (allegations that “about half of the employees at IBP’s Joslin meatpacking plant are aliens who cannot work lawfully in the United States and that IBP not only knows in a statistical sense that many of its workers lack the sort of visas that authorize working here but also can identify which ones they are, yet winks at obviously fake green cards and other spurious credentials.”); *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374, 379 (2d Cir. 2001) (janitorial company which did not hire illegal immigrants sued competitor which had been prosecuted for hiring hundreds of illegal immigrants); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9<sup>th</sup> Cir. 2002)(alleging widespread hiring of illegal immigrant farm workers); *Trollinger v.*

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<sup>11</sup>CNNMoney.com, “Police: Wal-Mart Site Raided,” Nov. 19, 2005, [http://money.cnn.com/2005/11/18/news/fortune500/walmart\\_raid/index.htm](http://money.cnn.com/2005/11/18/news/fortune500/walmart_raid/index.htm)

*Tyson Foods, Inc.*, 370 F.3d 602, 606 (6<sup>th</sup> Cir. 2004)(employees' suit followed federal indictment of Tyson Foods, Inc., for conspiracy to smuggle aliens into the United States and hiring illegal immigrants at 15 plants in nine states).

**C. Employers Are Preferentially Hiring Illegal Immigrant Workers to the Detriment of American Low-Income Workers.**

Given the obvious economic incentives to hire cheaper illegal immigrant workers and the lack of any realistic enforcement threat, employers are apparently choosing to preferentially hire illegal immigrants. “A startling new study<sup>[12]</sup> shows that all of the growth in the employed population in the United States over the past few years can be attributed to recently arrived immigrants.” Bob Herbert, “Who’s Getting the New Jobs,” *The New York Times*, July 23, 2004, A23, col. 6, <http://select.nytimes.com/gst/abstract.html?res=F60D10FF3D590C708EDDAE0894DC404482>.

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<sup>12</sup>Sum, Fogg, Khatiwada and Palma, “Foreign Immigration and the Labor Force of the U.S.,” Center for Labor Market Studies, Northeastern University, July 2004. *See, also*, Steven Camarota, *A Jobless Recovery?* Center for Immigration Studies, October 2004, [www.cis.org/articles/2004/back1104.html](http://www.cis.org/articles/2004/back1104.html).

In other words, “all of the net” new American jobs are going to “new immigrants,” many of them illegally present in the United States.<sup>13</sup> This job “capture” has changed the composition of the American workforce: “One of every seven people working in the United States in 2004 was born elsewhere; a decade earlier, only one in ten workers was foreign born.” Congressional Budget Office, *The Role of Immigrants in the U.S. Labor Market*, (“CBO Study”), November 2005, Preface. An even greater shift toward “new immigrants” is expected. *Id.*, 25 (“future labor force growth is likely to be largely the result of immigration.”).

This job “capture” has also decreased the wages paid to native-born workers. “[Professor George J.] Borjas<sup>14</sup> [of Harvard University] calculated that the average weekly earnings of native-born men as a group would be reduced by 3 percent to 4 percent,” CBO Study, *supra*, 23, *citing*, George J. Borjas, “The Labor Demand

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<sup>13</sup>The authors differentiated immigrants only by length of time in the United States, not by legal status, although they acknowledge that many immigrants in their study were illegally present in the United States. Sum, Fog, *supra*. The most recent estimates suggest that half of all “new immigrants” are illegal immigrants. Steven Camarota, *Immigrants at Mid-Decade: A Snapshot of America's Foreign-Born Population in 2005*, Center for Immigration Studies, December 2005, [www.cis.org/articles/2005/back1405.html](http://www.cis.org/articles/2005/back1405.html)

<sup>14</sup>Prof. Borjas was also an expert witness for the defendants in this case.

Curve Is Downward Sloping: Re-examining the Impact of Immigration on the Labor Market,” 18 *Quarterly Journal of Economics*, no. 4 (2003), pp. 1335-1374.

Even Plaintiffs’ own studies indicate that illegal immigrants depress wages for other workers. Last year, Plaintiffs U.S. Chamber of Commerce and National Roofing Contractors Association commissioned a study of the economic effects of the Arizona legislation at issue in this case. Peter Creticos, “Assessing the Economic Effects of State Laws Addressing the Employment of Foreign-Born Unauthorized Workers,” December 2007, [www.stateimmigrationlaws.com/NR/rdonlyres/ezlhnhx5f64asl4rqdymrlyo6xg7qni mzf4ur2zqtiy5lrdui4cglp2p4a3wi64b7sekr23ib37prytq4rbg73b5b/ImmigrationReport12.11.pdf](http://www.stateimmigrationlaws.com/NR/rdonlyres/ezlhnhx5f64asl4rqdymrlyo6xg7qni mzf4ur2zqtiy5lrdui4cglp2p4a3wi64b7sekr23ib37prytq4rbg73b5b/ImmigrationReport12.11.pdf). The study finds the “employment effects” of the Arizona law “may include: . . . A short term increase in average hourly wages, especially in those industry sectors employing a high proportion of immigrants.” *Id.*, at 15.

The impact of this job transference is not equally shared: “Those most affected by the influx of new immigrant workers are young, less well-educated American workers and so-called established immigrants, those who have been in the U.S. for a number of years.” Herbert, *supra*. Professor Borjas notes that “high school dropouts” would experience the “largest adverse impact [on wages] . . .

about nine percent lower than they would be in the absence of increased competition from foreign-born workers.” CBO Study, *supra*, 23-24.

In summary, the federal immigration law enforcement experience of the last decade indicates that whatever Congress’s intention in enacting 8 U.S.C. § 1324a, the net effect has been negligible. In fact, the situation which confronted Congress in 1986 has worsened, to the detriment of those who are the intended beneficiaries of immigration protections.

In light of these unambiguous facts, to adopt Appellants’ position is to do exactly what the District Court warned about: “we take ineffective enforcement to be the ‘real’ federal policy from which state law must not deviate.” *Ariz. Contractors Ass’n v. Candelaria*, 534 F.Supp.2d at 1055. No wonder *amici* are so eager not to discuss “the efficacy” of Congress’s choice here. Unless a lack of regulation results from an objective decision to refrain, in the absence of regulation a state is free to legislate within its purview. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995). Appellants and their *amici* would have to argue that the lack of enforcement is an “objective decision to refrain” from enforcement by a regulator to whom Congress delegated decisive authority, and, even if many suspect that to be the case, there was no such evidence presented at trial.

The Supreme Court has observed repeatedly that preemption is ordinarily not to be implied absent an “actual conflict.” *English v. General Elec. Co.*, 496 U.S. 72, 90 (1990); *Savage v. Jones*, 225 U.S. 501, 533 (1912). The “teaching of this Court's decisions ... enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.” *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960). There seems to be no conflict between the Arizona law and the actual intent of Congress to protect American workers.

## **II. IMMIGRATION LAW ENFORCEMENT IS NO LONGER EXCLUSIVELY A FEDERAL PROVINCE.**

In 1996, Congress expanded federal law to create a private right of action for treble damages against employers of illegal immigrants. It did so in part because it was confronted with the failure of employer sanctions discussed above. The fact that it did so by expanding private judicial remedies which can be addressed in state court is significant in the context of the preemption and constitutional challenges to the Arizona statute presented here.

The crux of Appellants’ and *amici*’s argument is that Congress intended that only the federal government enforce the prohibition against hiring illegal immigrants. *See, e.g.*, “It is against federal law to knowingly employ illegal workers, and employers who disregard this stricture are subject to an exclusive

(and extensive) federal system of administrative adjudication and penalty.” State Chambers’ Br., 4. Or as Appellants put it in their opening brief: “IRCA’s language, structure, purpose, and relationship to other statutes all confirm that Congress intended to expressly preempt state and local employer sanctions schemes such as Arizona’s.” Appellant’s Opening Br., at 19.

A look at IRCA, as amended, demonstrates that these claims of exclusivity and purely administrative enforcement are wrong, though it may require a glance at IRCA’s “relationship to other statutes.” Appellant’s Opening Br., at 19. The statutory section immediately prior to the employer sanctions provision, for example, 8 U.S.C. § 1324, was amended in 1996 to provide a treble damages claim to individuals and states against employers of illegal immigrants; this claim is outside of the “exclusive (and extensive) federal system of administrative adjudication and penalty” touted by *amici*. State Chambers’ Br., at 4.

The Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, added Chapter 96 to Title 18 of the United States Code, entitled Racketeer Influenced and Corrupt Organizations (“RICO”). 18 U.S.C. §§ 1961-1968; *U.S. v. Turkette*, 452 U.S. 576, 577-78 (1981). Only certain predicate crimes trigger the application of RICO. 18 U.S.C. § 1961(1).

Congress was aware in 1996 that employer sanctions were not effective in stopping employers from hiring illegal immigrants. H. Rep. 104-469, at 129 (1995). In 1996, Congress amended the list of RICO predicate crimes to include “any act which is indictable under the Immigration and Nationality Act, section 274 [8 U.S.C. § 1324] (relating to bringing in and harboring certain aliens) . . . if the act . . . was committed for the purpose of financial gain.” 18 U.S.C. § 1961(1)(F).

That same year, Section 274 was expanded to include multiple hiring of illegal immigrants. 8 U.S.C. § 1324(a)(3)(A), Pub.L. 104-208, Div. C, Title II, § 203(b)(4). Thus, Congress applied RICO to the organized hiring of illegal immigrants. State courts have concurrent jurisdiction over civil RICO claims. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The assertion of an “exclusive (and extensive) federal system of administrative adjudication and penalty,” State Chambers’ Br., at 4, cannot be sustained on the plain language of the statute.

Nor is this power completely unused. Though still controversial, some appeals courts, including this one, have upheld individual workers’ rights to bring RICO claims against employers who used illegal immigrant workers to lower their wages and compete for their jobs. *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9<sup>th</sup> Cir. 2002); *Williams v. Mohawk Industries*, 411 F.3d 1252 (11<sup>th</sup> Cir.

2005)(upholding denial of motion to dismiss American workers’ RICO claim against repeated and widespread hiring of illegal immigrant workers), *certiorari* dismissed, after oral argument, as improvidently granted, 547 U.S. 1075 (2006). On remand, in *Mohawk Industries*, for example, the Eleventh Circuit again refused to dismiss the workers’ challenge to their employer’s hiring practices. 465 F.3d 1277 (11<sup>th</sup> Cir. 2006), *cert. denied*, 127 S.Ct. 1381, 167 L.Ed.2d 174, (U.S. Feb 26, 2007) (No. 06-873).

One of the purposes of RICO was “the need to protect the public from those who would run ‘organization[s] in a manner detrimental to the public interest.’” *Cedric Kushner Promotions, Ltd., v. King*, 533 U.S. 158, 165 (2001), *citing* S.Rep. No. 91-617, at 82 (1969). Similarly, RICO “protects the public against those who would unlawfully use an ‘enterprise’ (whether legitimate or illegitimate) as a ‘vehicle’ through which ‘unlawful . . . activity is committed.’” *Id.*, *citing National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994).

Business efficiency is not the purpose of these prohibitions. As the courts have long recognized, a “primary purpose in restricting immigration is to preserve jobs for American workers.” *I.N.S. v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). The lower

court in this case recognized the tension between business interests and protections for American workers:

People disagree whether the great number and continuing flow of unauthorized workers into the United States has more benefits than costs. But no one can disagree that the costs and benefits accrue differently to different people in our society. It is the responsibility of our elected representatives in Congress and in our legislatures to strike the balance among those competing social and economic interests. . . . The balance now struck is in favor of an economy for those who may work in the United States. *See Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1011 (9<sup>th</sup> Cir. 2007) . . . The benefits in fact to those who come to this country against the law to make better lives for themselves, to those who save from lower cost labor and general depression of wages from employing unauthorized aliens, and to those who enjoy the products of unauthorized labor at lower prices, do not count. The beneficiaries chosen identically by federal and Arizona law prevail over all who benefit from unauthorized alien labor.

*Ariz. Contractors Ass'n v. Napolitano*, *supra*, slip op. at \*6, 2007 WL 4570303.

When it amended RICO, Congress's purpose was to protect American workers (and not coincidentally, the immigrants themselves) from employers who

would break the laws for profit. The 1996 RICO amendment was, in fact, specific to protecting against exploitation of smuggled illegal immigrants. As the sponsors of this amendment noted:

In the past couple of years we have heard about boatloads of Chinese immigrants being brought to the United States under horrifying conditions – weeks with no clean water, minimal food, and unsanitary conditions beyond imagination. The gangs responsible for smuggling these people into the United States then force them into slave labor, working 12- to 14-hour days, 7 days a week in gruesome conditions just to pay off the \$30,000 to \$40,000 debt they incurred. These horrible abuses at the hands of people willing to profit from the trade of human beings must be stopped.

The purpose of this provision is to address the problem of slave trade, where traffickers use the dream of America and freedom to lure people into the bondage of slavery for their own profit.

141 CONG. REC. H1590 (Feb. 10, 1995) (Statement of Cong. Kennedy).

Though Cong. Kennedy’s language may be hyperbolic and may not apply to any parties to this case,<sup>15</sup> the sponsor’s statement indicates that Congress’s purpose was to stop an odious practice, and not to recognize concerns about efficiency in hiring. Just as Congress believed that Section 1324a would remove a magnet for illegal immigration, Congress believed that using private claims under Section 1324 would also help stop the “horrifying conditions” to which the immigrants may have been subject.

RICO and 8 U.S.C. § 1324 were not raised in this case. As a policy matter, however, it would be odd to say that individuals have a private right to sue their employers in state courts for hiring illegal immigrants, but that states are preempted from enacting any such licensing or similar laws because the state laws conflict with Congress’s purposes in enacting an “exclusive (and extensive) federal system of administrative adjudication and penalty.” *State Chambers’ Br.*, at 4.

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<sup>15</sup>Some of the present-day cases involve charges similar to those which sparked congressional action ten years ago; for example, illegal immigrant workers were being locked inside stores at night against their will, though the defense was that this was for security reasons. *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295, 334-35 (D.N.J. 2005). *See, also, Incalza*, 479 F.3d 1005 (illegal immigrant worker discharged when employer could easily have obtained legal status). Similar abuses are reported regularly around the country. *See, e.g.*, Elissa Silverman, “Pay Fight in Tech’s Trenches; Day Laborers for a Verizon Subcontractor Say They were Cheated,” *The Washington Post*, Feb. 16, 2006, D1, col. 2 (cable construction workers not paid).

In both 8 U.S.C. §§ 1324 and 1324a, Congress did not intend that federal enforcement be an exclusive federal administrative remedy. It sought assistance from others in 1986 by permitting states to use “licensing and similar statutes” against those who hire illegal immigrant workers to compete with American workers, and, when that didn’t work, in 1996, by private RICO enforcement.

*Amicus* here will not repeat the preemption and other arguments already presented in the Appellees’ opening brief, with which it fully agrees. Yet, as shown above, Arizona’s attempt to address these problems is consistent with both provisions of federal law, and thus cannot conflict with federal law.

### **CONCLUSION**

For the reasons stated above, *Amicus* respectfully requests this Court to affirm the decisions below.

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May 5, 2008

## CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 29(d) and Ninth Circuit R. 32-1, the attached *amicus curiae* brief is proportionately-spaced, has a typeface of 14 points or more, and contains 7,000 words or less (6,436 words according to Microsoft Word 2003).

May 5, 2008

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Barnaby W. Zall

## CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2008, I caused true and correct copies of the foregoing Brief of *Amicus Curiae* American Unity Legal Defense Fund, to be served by first-class mail upon counsel designated by the parties at the following addresses:

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