No. 09-115

In the Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *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 OF *AMICUS CURIAE* STATE SENATOR RUSSELL PEARCE IN SUPPORT OF RESPONDENTS

Paul J. Orfanedes*
James F. Peterson
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
porfanedes@judicialwatch.org
(202) 646-5172
Counsel for Amicus Curiae

* Denotes Counsel of Record

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INTEREST OF *AMICUS CURIAE*[1]

State Senator Russell Pearce of Arizona is the author of, and the driving force behind, the "Legal Arizona Workers Act."

During his years in the Arizona Legislature, Senator Pearce has authored numerous legislative initiatives designed to protect the State of Arizona from the adverse effects of unlawfully present aliens and, most importantly, to uphold the rule of law. These include the following: Proposition 100, a State constitutional amendment to deny bond to any person unlawfully present in the United States who commits a serious crime in Arizona; Proposition 102, which states that a person unlawfully present in the United States who sues an American citizen cannot receive punitive damages; Proposition 200, which requires individuals to produce proof of citizenship before they may register to vote; and "The Support Our Law Enforcement and Safe Neighborhoods Act" (known as "SB 1070"), which codifies as Arizona law certain already existing enforcement provisions of federal law. Senator Pearce's initiatives have served as models for similar legislation in numerous other States across the nation.

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[1] All parties consent to the filing of *amicus curiae* briefs in this matter. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or his counsel made a monetary contribution to its preparation or submission.

As author of the "Legal Arizona Workers Act," Senator Pearce has a direct interest in this matter and, therefore, respectfully submits this *amicus curiae* brief.

INTRODUCTION

The issues before this Court are straightforward and familiar. Petitioners assert that the "Legal Arizona Workers Act" is preempted by federal law regulating the employment of aliens. Nearly thirty-five years ago, however, this Court unequivocally affirmed that States possess broad authority under their police powers to regulate employment even if such regulation touches on immigration. *De Canas v. Bica*, 424 U.S. 351, 356 (1976). To date, this decision has not been overruled or even questioned.

Despite this well-established precedent, Petitioners assert that the State of Arizona lacks the authority to penalize employers for hiring unauthorized workers, allegedly because the legislation burdens employers. In other words, employers who put profits over patriotism by hiring unlawfully present aliens would be "burdened" by losing the substantial benefit of paying sub-standard wages. These same employers would be "burdened" by having to comply with tax laws related to social security, unemployment, and medicare, as well as occupational health and safety standards that they currently avoid.

Contrary to Petitioners' disingenuous claims, Senator Pearce authored legislation that is consistent

with federal law. The "Legal Arizona Workers Act" prohibits employers from knowingly or intentionally employing unauthorized workers. Additionally, all Arizona employers must use the federal "E-Verify" program to confirm the employment eligibility of new employees. The "Legal Arizona Workers Act" falls well within the traditional police powers of the State. This Court therefore must reject Petitioners' attempt to protect scofflaw employers at the expense of legal Arizona workers by overturning well-established law.

SUMMARY OF ARGUMENT

The "Legal Arizona Workers Act" is not preempted by federal law. The legislation falls comfortably within the State's fundamental police powers as it regulates the employment relationship to protect workers within the State. The unauthorized worker provisions and the E-Verify mandate merely enable the State to exercise enforcement authority concurrent with that of the federal government. Petitioners therefore cannot overcome the presumption against preemption and cannot show that the State of Arizona has protected its citizens in a manner that hypothetically conflicts with federal objectives.

ARGUMENT

I. Our Constitution Establishes a System of Dual Sovereignty.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v.*

Ashcroft, 501 U.S. 452, 457 (1991). Under our federal system, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Id.* (*citing Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). Hence, while the States have surrendered certain powers to the Federal Government, they retain "residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 919 (1997) (*quoting* THE FEDERALIST No. 39 (James Madison)). This Court has described this system of dual sovereignty as the following:

> The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence . . . Without the States in union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Gregory, 501 U.S. at 457 (*citing Texas v. White*, 74 U.S. 700 (1869), *quoting Lane County v. Oregon*, 74 U.S. 71 (1869)).

Under our system of dual sovereignty, States have the authority to act – including in areas touching on immigration – when States prohibit activity that is already prohibited under federal law. *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) ("Where State enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized."). More simply put, where "[f]ederal and local enforcement have identical purposes," preemption does not occur. *Id.* at 474. Or, as Judge Learned Hand succinctly explained, "[I]t would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the States may allow." *Marsh v. U.S.*, 29 F.2d 172, 174 (2d Cir. 1928); *see also Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987) ("No statute precludes other federal, State, or local law enforcement agencies from taking other action to enforce this nation's immigration laws.").

Senator Pearce carefully crafted the "Legal Arizona Workers Act" to ensure that it did not impair federal regulatory interests and did no more than authorize the State to exercise enforcement authority concurrent with that of the federal government. The "Legal Arizona Workers Act" exercises the State of Arizona's authority as a dual sovereign and protects authorized workers in Arizona by regulating employment standards.

II. Regulation of Employment is a Fundamental Police Power of the States.

For nearly thirty-five years it has been undisputed that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *De Canas*, 424 U.S. at 356; *see also Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 984 (9th Cir. 2008) ("[T]he power to regulate the employment of unauthorized aliens remains within the States' historic police powers."). In *De Canas*, the State of California "sought to strengthen its economy" by enacting legislation to "protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens." 424 U.S. at 357. California argued, and this Court agreed, that "[e]mployment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs [and] acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens." *Id.* at 356-357. In reviewing the California legislation, this Court held, "These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico." *Id.* at 357.

The current situation in Arizona is strikingly similar to the conditions that existed in California during the 1970s at the time of *De Canas*. Arizona is not only suffering from high unemployment, it also is struggling with the effects of "rampant illegal

immigration." *United States v. Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. 2010). Like the California Legislature in *De Canas*, the Arizona Legislature properly used its broad authority under its police powers to regulate employment. 424 U.S. at 356.

Moreover, Petitioners are simply incorrect when they assert that the "Legal Arizona Workers Act" attempts to regulate immigration. As this Court has stated, the mere fact that "aliens are the subject of a State statute does not render it a regulation of immigration." *De Canas*, 424 U.S. at 352-353. Regulation of immigration is "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355; *Toll v. Moreno*, 458 U.S. 1, 10 (1982) ("The authority to 'control immigration' is the power to 'admit or exclude aliens.'").

The "Legal Arizona Workers Act" plainly does not impose new restrictions on the manner in which an alien enters the country. Nor does it impose new conditions under which a legal entrant may remain in the country. The "Legal Arizona Workers Act" simply regulates employment standards by "target[ing] employers who hire illegal aliens." *Chicanos Por La Causa*, 544 F.3d at 979.

III. A Presumption against Preemption Exists.

Because the legislation solely regulates employment within the State, the "Legal Arizona Workers Act" falls comfortably within the scope of the State's traditional police powers. As this Court has

consistently held, "[p]reemption of employment standards 'within the traditional police power of the State' should not be lightly inferred." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (*citing Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987)). Therefore, Petitioners must overcome a strong presumption against preemption.

Significantly, Petitioners fail to even address this presumption. As the Ninth Circuit correctly explained, "When Congress legislates 'in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Chicanos Por La Causa,* 558 F.3d at 983 (*quoting United States v. Locke*, 529 U.S. 89, 108 (2000)); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("In all preemption cases . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was a clear and manifest purpose of Congress."); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Allen-Bradley Local v. Wisconsin Employment Bd.,* 315 U.S. 740, 749 (1942); *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611 (1926).

Finally, this Court has held that preemption must not be found absent clear congressional intent. "[W]e will not infer pre-emption of the States' historic police powers absent a clear Statement of intent by Congress." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 111-12 (1992) (Kennedy, J., concurring) (*citing Rice,* 331 U.S. at 230;

Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); and *English v. General Electric Co.*, 496 U.S. 72, 79 (1990)). Moreover, there is an "obligation to infer pre-emption only where Congress' intent is clear and manifest." *Cipollone v. Liggett Group*, 505 U.S. 504, 524 (1992) (Blackmun, J., dissenting).

This Court also relied on this same principle in *De Canas*:

> [F]ederal regulation . . . should not be deemed pre-emptive of State regulatory power in the absence of persuasive reasons-either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.

424 U.S. at 356 (*quoting Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)). Since *De Canas* has not been overturned or even questioned, this Court should apply this long-standing principle and decline to infer preemption of Arizona's historic police powers.

IV. Petitioners Bring a Facial Challenge, which is the Most Difficult Challenge to Mount Successfully.

Not only do Petitioners ignore the presumption against preemption, Petitioners also ignore the fact that they have brought a facial challenge. Because there is no specific factual background under which the legislation can be analyzed, Petitioners cannot and

have not presented any evidence that the enforcement of the "Legal Arizona Workers Act" would actually frustrate the purposes of Congress.

As this Court has consistently explained, a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Or as the Ninth Circuit succinctly explained, "[A] speculative, hypothetical possibility does not provide an adequate basis to sustain a facial challenge." *Chicanos Por La Causa,* 558 F.3d at 866.

Facial challenges generally are disfavored because they rest on speculation, run contrary to the fundamental principal of judicial restraint, and threaten to "short circuit" the democratic process. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). When a legislative enactment is attacked facially, a court is at a disadvantage because it does not know how the law will be applied or construed by an enforcing authority. As this Court has declared, "It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzalez v. Carhart*, 550 U.S. 124, 168 (2007).

As the Ninth Circuit explained:

> We uphold the statute in all respects against this facial challenge, but we must

> observe that it is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision.

Chicanos Por La Causa, 558 F.3d at 980. Unless and until a factual background exists demonstrating that the goals of Congress have been frustrated, this Court should refrain from reaching conclusions based on hypotheticals.

CONCLUSION

For the foregoing reasons, Senator Pearce respectfully requests that this Court affirm the Ninth Circuit's decision and hold that the "Legal Arizona Workers Act" is not preempted by federal law.

Respectfully submitted,

Paul J. Orfanedes*
James F. Peterson
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
porfanedes@judicialwatch.org
(202) 646-5172

Counsel for Amicus Curiae

* Denotes Counsel of Record