NOS. 08-6127, 08-6128

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiffs/Appellees,

v.

W.A. DREW EDMONDSON, ET AL.,
Defendants/Appellants in No. 08-6127

and

THOMAS E. KEMP, JR., ET AL.
Defendants/Appellants in No. 08-6128

AMICUS CURIAE BRIEF OF THE HUMAN RESOURCE INITIATIVE FOR A LEGAL WORKFORCE AND ASSOCIATED BUILDERS AND CONTRACTORS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
CASE NO. CIV-08-109-C
HONORABLE ROBIN J. CAUTHRON

David A. Selden
Julie A. Pace
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
3300 Tower, Suite 1800
3300 North Central Avenue
Phoenix, AZ 85012-2518
602-798-5400

Burt M. Rublin
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
215-665-8500

Attorneys for The Human Resource Initiative For a Legal Workforce and Associated Builders and Contractors, Inc.

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STATEMENT OF INTEREST

Amici file this Brief with the consent of all parties. The Human Resource Initiative for a Legal Workforce ("HR Initiative") represents the views of human resource professionals in thousands of small and large U.S. employers representing every sector of the U.S. economy. Members of the HR Initiative include the American Council on International Personnel, College and University Professional Association for Human Resources, HR Policy Association, International Public Management Association for Human Resources, National Association of Manufacturers, and the Society for Human Resource Management.

The collective membership of the HR Initiative represents the front lines on employment verification, and as such, is fully committed to hiring only work-authorized individuals.

Associated Builders and Contractors, Inc. ("ABC") is a national construction industry trade association representing nearly 25,000 individual employers in the commercial and industrial construction industry. ABC also has 78 chapters throughout the United States.

ABC represents both general contractors and subcontractors throughout the United States. The majority of ABC's member companies are "merit shop" companies and its diverse membership is bound by a shared commitment to the construction industry's merit-shop philosophy. The merit-shop

philosophy is grounded on the principle of full and open competition, without regard to labor affiliation, where construction contracts are awarded to the lowest responsible bidder through open and competitive bidding. The merit-shop philosophy helps ensure that taxpayers and consumers alike receive the most for their tax and construction dollar.

Conservatively, ABC's members employ more than 5.4 million skilled construction workers, whose training, skills and experience span all of the twenty-plus skilled trades that comprise the construction industry. The workforce of merit-shop companies comprises more than 80 percent of the private construction industry as a whole.

Amici will not burden the Court by reiterating herein the compelling legal arguments why the Oklahoma Act is preempted by federal law, as those arguments are already well presented in the briefs submitted by the appellees and other amici. Instead, Amici submit this brief solely in order to bring to the Court's attention the myriad practical problems and difficulties created by the Act's requirement that employers utilize the "E-Verify" program.[1]

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[1] E-Verify is also known as the Basic Pilot Program. Basic Pilot is the statutory term for the experimental program, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, while E-Verify is the name recently adopted by the Department of Homeland Security for the Internet based pilot employment verification system.

ARGUMENT

A. E-Verify Is Seriously Flawed

Congress carefully designed the E-Verify program as an experimental, pilot program so that it could closely monitor the program's effectiveness, burdens and consequences to ensure that the federal government established the correct balance between government's enforcement obligations, employers' costs, operational difficulties and delays, employers' responsibilities to avoid discrimination, and employee rights. Studies have repeatedly demonstrated that E-Verify is rife with errors and inaccuracies.

Just four months ago, in early June 2008, the House of Representatives conducted hearings on the E-Verify system and assessed whether the program should become mandatory.[2] It became clear from the testimony and Department of Homeland Security ("DHS") announcements that, while the system has been improved, it still has a long way to go.

In the Government Accountability Office ("GAO") Report issued during the June 2008 hearings, the GAO evaluated the accuracy of E-Verify, and indicated that 7 percent of the E-Verify queries cannot be immediately confirmed

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2 *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (June 10, 2008).

as work authorized by the Social Security Administration ("SSA"), and about 1 percent cannot be immediately confirmed by DHS.[3] Similarly, according to a 2007 Westat independent study commissioned by DHS, 10% of naturalized citizens have erroneous data in their DHS and/or SSA files that would cause them to be tentatively nonconfirmed.[4]

A foreign-born work-authorized person is 30 times more likely to receive an erroneous tentative nonconfirmation than someone born in this country. Westat study at xxi, xxv, 97, 100. These problems subject work-authorized foreign-born individuals, including naturalized citizens, to discrimination and "potential harm arising from the Web Basic Pilot process." *Id.* at xxv. Fixing these problems, the study found, "will take considerable time and will require better data collection and data sharing between SSA, USCIS, and the U.S. Department of State than is currently the case." *Id.* at xxvi, 149-50.

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3 *Employment Verification – Challenges Exist in Implementing a Mandatory Electronic Employment Verification System, Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways and Means,* 110th Cong. (2008) (statement of Richard M. Stana, Director of Homeland Security and Justice Issues, U.S. Government Accountability Office) (hereinafter "GAO Report"), *available at* http://www.gao.gov/new.items/d08729t.pdf.

4 Westat, *Findings of the Web Basic Pilot Evaluation* (Sept. 2007), at xxv-xxvi, 57 (hereinafter "Westat study"). The Westat study is contained in the Appendix filed by the Attorney General and Human Rights Commissioners in No. 08-6127.

According to SSA's own estimates, 17.8 million records in the SSA database, the primary source of data for the E-Verify program, contain discrepancies related to name, date of birth, or citizenship status.[5] Considering the high database error rates and the inordinate number of inaccuracies with regard to U.S. citizens and other work eligible nonimmigrants, the Westat study concluded that "the database used for verification is still not sufficiently up to date to meet the [IIRIRA] requirement for accurate verification."[6] The GAO report goes on to elaborate that DHS and SSA current resources are not equipped to manage a significant expansion of E-Verify users, particularly a nationwide electronic employment verification mandate.[7]

Employers are confronted with long periods of uncertainty while federal agencies evaluate whether tentative nonconfirmations are correct. Whenever the system returns a tentative nonconfirmation, the employer must suspend action on the employee for 10 work days to allow the employee an opportunity to contest the result with SSA or DHS. Pilot Programs for

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5 Office of the Inspector General, Social Security Administration, *Congressional Response Report: Accuracy of the Social Security Administration's Numident File, A-08-06-26100* (December 2006), *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf.

6 Westat study, *supra* note 4, at xxi.

7 GAO Report, *supra* note 3, at 10.

Employment Eligibility Confirmation, 62 Fed. Reg. 48,309, 48,312 (Sept. 15, 1997). The employer must further suspend action during any subsequent period "while SSA or the Department of Homeland Security is processing the verification request." Memorandum of Understanding ("MOU") ¶ II.C.10 (A134). According to the 2007 Westat study, the average amount of time it takes for SSA or DHS to resolve a challenge to a tentative nonconfirmation ranges from 19 to 74 days. Westat study at 78-79. "During this period, the employer may not terminate or take adverse action against the employee based upon his or her employment eligibility status." Pilot Programs, 62 Fed. Reg. at 48,312; MOU ¶ II.C.10.

The 2007 Westat study notes that many employers, particularly small businesses and companies that recently started using E-Verify, have complained of multiple problems:

- In cases where database information is not sufficiently up to date, which is often the situation with naturalized citizens, manual review is required. "This review is time consuming and can result in discrimination against work-authorized foreign-born persons during the period that the verification is ongoing. . ." Westat study at xxi.
- Employers complained of difficulties and problems with "system unavailability during certain times. . . problems accessing the system. . . training new staff to perform verifications using the system. . . problems related to passwords and cases involving tentative nonconfirmations." *Id.* at xxii, 66.
- "Some employers expressed frustration with their interactions with SSA and USCIS in relation to the Web Basic Pilot. Some employers commented that local SSA representatives were not familiar with the Web Basic Pilot program and did not return their calls, were unable to

answer questions, and sometimes made mistakes that resulted in final nonconfirmation findings for employees. In addition, several employees commented that there was a lack of coordination between SSA and USCIS in terms of ensuring that both agencies had up-to-date records on immigrants. A few employers also requested that the program require faster turnaround times for both SSA and USCIS." *Id.* at 66.

- "Some employers believe that they lose their training investment as a result of electronic employment verification through the Web Basic Pilot process. IIRIRA requires employers to wait up to a total of 10 Federal working days for employees to contest their cases and for SSA or USCIS to issue a final case finding. The Web Basic Pilot prohibits employers from dismissing or withholding training from these employees during this period. One case study employer found this process disadvantageous because the company had to invest in hiring and training employees without certainty that they would be able to continue employment. This employer reported a higher turnover rate as a result of using the Web Basic Pilot, as well as significant costs associated with providing training, safety equipment, and handbooks to so many employees who were ultimately lost because of final nonconfirmation findings." *Id.* at 68.

- "frustration with inaccuracies in the Federal data, which led to employees having to go to SSA field offices; the extra time and paperwork required by the program; little perceived benefit compared to the Form I-9 process; difficulties in meeting the 3-day requirement for submitting cases to the Web Basic Pilot Program; a belief that the program did not provide the employer and employee with sufficient information when a tentative nonconfirmation was issued; distance from the nearest SSA field office, which made it difficult for employees to resolve tentative nonconfirmations; and dissatisfaction with the fact that Basic Pilot participants had been identified to Congress and the White House." *Id.* at 64.

- difficulty understanding and internalizing the Basic Pilot Program's special rules, resulting in a "substantial" rate of employer non-compliance with the applicable requirements and procedures. *Id.* at xxii-xxiv, 70-80.

The many problems and errors in the E-Verify program have prompted the State of Illinois to enact a law prohibiting employers from using it, absent certain conditions that the E-Verify program has not achieved. 820 Ill. Comp. Stat. § 55/12. Given the extensive problems with E-Verify, it is hardly surprising that, even though the program has been in existence since 1996, only a very small fraction of employers have elected to enroll. As of May 2008, only 64,000 employers had enrolled in E-Verify. Press Release, U.S. Citizenship and Immigration Services, USCIS Announces Enhancements to E-Verify Program (May 5, 2008).[8] The system can only verify that the identity information presented on the documents provided matches information in the SSA and DHS databases.

The burdens of using E-Verify are compounded by the fact that it has proven ineffective in addressing the problems of identity theft that it was meant to address. The GAO recently concluded that E-Verify does little to prevent identity theft, which is becoming an increasingly common problem in the unauthorized employment area. GAO stated: "E-Verify may help employers detect fraudulent documents, thereby reducing such fraud, but it cannot yet fully address identity fraud issues, for example, when employees present borrowed or stolen genuine

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[8] Available at http://www.uscis.gov/files/article/everify050508.pdf.

documents."[9] Paradoxically, it has been reported that the use of E-Verify might actually increase the incentive for identity theft by those hoping to game the system. Miriam Jordan, *How to Make Identity Theft Worse*, Wall Street Journal, Aug. 7, 2008 at 8. Even the E-Verify photo tool has not helped deter identity theft, as the photo tool is used in only a small percentage of the verification queries. The photo tool is not used if the employee claims to be a U.S. citizen or if the employee uses a driver's license or state ID card as a form of identification to complete the I-9. The photo tool is used only for employees who attest on the I-9 to being a non-citizen and whose pictures are already in the DHS database.

The flaws in the E-Verify system have resulted in legally-authorized individuals being improperly denied employment, as well as non-work authorized individuals being improperly verified by the system. These false positives mean that employers have little or no assurance that using the E-Verify system will result in an authorized workforce. Several large employers using E-Verify have already experienced severe disruption to their business operations after hundreds of employees who were improperly cleared by E-Verify were arrested for a variety of immigration and identity theft violations.[10]

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9 GAO Report, *supra* note 3, at 5.

10 For instance, in December, 2006, raids of six locations of Swift & Co. resulted in arrests of approximately 1,200 workers on identity theft charges.
(continued...)

Indeed, one of the most troubling aspects of the E-Verify program lies in the fact that the Memorandum Of Understanding ("MOU") that employers sign when registering to use E-Verify specifically allows ICE to enter their workplace, search the premises, and question employees with no advance warning. In stark contrast, employers not participating in E-Verify are given three days advance notice that their I-9s and required immigration documentation are to be inspected.

The errors in the E-Verify program create real dilemmas and quandaries for employers. The following hypothetical illustrates the problem:

> Your company, newly enrolled in E-Verify, has extended an offer to a highly-skilled foreign national engineer, and you need him in the U.S. working on a critical project within a month. He received his visa after a significant expenditure of time and money. He enters the U.S. and reports for work the next day. You check his I-9 documents, complete the I-9 form and submit an initial verification query to the E-Verify system. The response from E-Verify is "Tentative Non-Confirmation."
>
> You provide the employee with the referral letter with instructions for fixing the issue with DHS. The employee goes to Social Security, and they tell him that they can't find a record of his status in the DHS database. He is told to follow up with DHS to resolve the issue, and is given eight working days to do so.

(...continued)

Swift was using E-Verify at the time and had been using it for several years. Mark Schoeff, Jr., *E-Verify Fails to Cover Company From Immigration Raid*, Workforce Management, Sept. 2, 2008, http://www.workforce.com/section/00/article/25/74/72.php.

> Eight working days have passed, and, as required, you check the system to see if the employee is authorized. What you find is that the system has issued a "final non-confirmation," telling you that the employee is not work authorized.
>
> You are now left with the unhappy choice of (1) terminating the employee, (2) continuing to employ him and reporting to the DHS that you are continuing to employ an individual after a final nonconfirmation – with the likely risk of fines and penalties for unauthorized employment, (3) attempting to work with DHS and the employee to resolve the issue and obtain a work-authorized confirmation from DHS, expending more time and money on the employee. If you terminate his employment but it ultimately turns out that the final non-confirmation was erroneous, you are potentially subject to a national origin discrimination claim. If the visa is valid and the nonconfirmation is erroneous, which has happened, the DHS may reverse the final nonconfirmation, but it usually takes several days or weeks spent on the phone with DHS and E-Verify officials or hiring an attorney to assist with the process.

In sum, E-Verify is a seriously flawed system which not only results in unacceptably high numbers of erroneous nonconfirmations, but also erroneously clears for employment many unauthorized workers who have engaged in identity theft. Indeed, Congress has apparently recognized that E-Verify is not sufficiently reliable to go beyond the experimental phase, as it has repeatedly rejected efforts to compel participation in the program, and has very recently extended the program only until March 2009.

B. Participation in E-Verify is Burdensome and Costly

The recent Westat study notes that there are significant costs associated with implementation and ongoing use of E-Verify. Not including intangible expenses such as diverted work hours, the report found that the monetary cost to set up the required computer systems and train personnel ranged from under $100 to over $500, with an average cost of $125, and maintaining the Program on an ongoing basis cost an average of $728, with some employers reporting costs of well over $1,500. Westat study at 104-06. The government estimates the cost for a federal contractor with 500 employees to be $8,964 in the first year,[11] which means larger employers – those with tens of thousands of employees – are faced with hundreds of thousands of dollars in ramp-up expenses.

Moreover, recent Congressional testimony by Mitchell C. Laird, President of MCL Enterprises, illustrates the burdens imposed by mandatory participation in the E-Verify program:

> At the time that the Arizona statute was passed, MCL Enterprises, like most Arizona companies, was not using E-Verify. Preparing for the transition to using E-Verify was extremely costly and disruptive to our operations. All of our restaurant managers, assistant managers, and directors of operations had to attend external training. The training cost the company both in the fees that are paid to attend the training sessions and in lost

[11] Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. 33,374, 33,379 (June 12, 2008).

> productivity of these critical employees. In addition to the external training, administrative staff of the company had to take time from their normal duties to review the E-Verify procedures manuals, take the online training, develop a written company policy, and then communicate that policy to the employees at the stores. We hire new employees every day. This means that we must create redundancies in the system and have multiple persons trained at every task in the Form I-9 and E-Verify process in order to comply with the requirement that all E-Verify queries be run within three days of the date of hire.[12]

Mr. Laird went on to inform the Committee that the training costs are ongoing, given the turnover in managerial and administrative positions and, despite all the training, there will be errors in the I-9 forms which must be resolved in order to process the E-Verify submissions. Mr. Laird also went on to describe what happens in those instances where the system's response is not "employment authorized":

> When the initial response from E-Verify is something other than "employment authorized," there are going to be additional costs to the employer. When there has been either an SSA or a Department of Homeland Security (DHS) tentative nonconfirmation, a notice must be prepared and delivered to the employee. The information

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12 *Employment Eligibility Verification Systems (EEVS) and the Potential Impacts on Social Security Administration's (SSA's) Ability to Serve Retirees, People with Disabilities and Workers: Hearing before H. Subcomm. on Social Security of the Comm. on Ways and Means*, 110th Cong. (2008) (statement of Mitchell C. Laird, President, MCL Enterprises, Inc., on behalf of the U.S. Chamber of Commerce), *available at* http://waysandmeans.house.gov/media/pdf/110/larid.pdf.

> on the notice is re-verified with the employee. If there is an error, then a new query must be run. If there is no error and the employee contests the tentative nonconfirmation, then a referral letter must be generated and delivered to the employee. Federal law requires that the employer continue to treat the employee as fully authorized to work during the time that the tentative nonconfirmation is being contested. This means the employer cannot suspend the employee or even limit the hours or the training for the employee.
>
> Someone must monitor any unresolved E-Verify queries on a daily basis to make sure that employee responses are being made in a timely manner.[13]

Small companies that do not have the means to set up systems and staffing with adequate training to monitor nonconfirmations may find themselves at risk for noncompliance. The E-Verify system does not provide any notices or alerts when it changes status from tentative non-confirmation to final non-confirmation, requiring the employer to constantly monitor the E-Verify system.

Large corporations which hire thousands of employees and have multiple worksites face especially daunting challenges as a result of compelled enrollment in E-Verify. Some employers have a centralized human resource department complete all I-9s. Others have local human resource assistants, store managers, department chairs, security guards or other trained personnel throughout their operations complete the I-9s. Files may be maintained at each employment

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13 *Id.*

location or centralized. Remote employees may be verified by notaries retained by the employer or the entire process may be outsourced to a vendor. Whatever the process, most large employers have developed their own in-house training programs to keep recruiters, managers and staff apprised of their compliance obligations.

To the extent large corporations are enrolled in E-Verify, most have enrolled only in certain states or hiring locations, and many have chosen to outsource E-Verify and I-9 to vendors at considerable expense, because verification is not a core business function. Even this limited enrollment requires months of planning and the resulting processes amongst companies are as individualized as the I-9 procedures. This planning includes legal review of the MOU, changing the process flow for onboarding new employees and documenting work authorization, developing new processes for handling tentative and final nonconfirmations, and training staff.

Large corporations report that, due to the volume of monthly new hires, they must have multiple people trained to run the E-Verify checks. It takes 3 to 4 hours for one person to register, read the MOU and take the tutorial. This time commitment multiplies for each person who must become familiar with the process. For those with multiple hiring sites, or where the E-Verify function is spread across the country, the costs would need to be multiplied to account for

several staff members at each location as well as training and coordination of policies and practices across locations.

Further burden arises from the fact that the E-Verify program is frequently changing. Every time the MOU changes, E-Verify employers will have to analyze whether they need to sign a new MOU. Every time the manual changes, which has occurred at least three times, employers will need to spend time deciphering what has changed, whether it impacts them, and how to accommodate any required changes. Every time the photo tool changes and expands, which DHS has repeatedly announced its intention to do, all E-Verify users will need to train their staff and change their processes accordingly, and then will need to audit compliance with the new standards. This on-going compliance obligation is compounded by the fact that a large employer cannot simply distribute the information provided by the government about legal changes. Each change must be translated into materials specific to the employer's processes and procedures.

The burdens imposed by E-Verify are particularly onerous in light of the current problems with the economy. Requiring use of the seriously flawed E-Verify program creates severe detrimental consequences for small businesses and our economy. Mandating use of an inaccurate system means that many employees will be incorrectly classified as not eligible to work.

The idea that any electronic employment eligibility verification system could eliminate our economy's demand for workers is naïve; employers who are currently using unscrupulous hiring methods will continue with unlawful hiring practices by using "off the books" transactions. Indeed, an April 4, 2008 letter from the Congressional Budget Office estimated that mandatory use of E-Verify by all U.S. employers would lead to an increase in undocumented workers being paid outside the tax system, which over a 10-year period would result in a loss of $17.3 billion in federal revenue.[14] These are factors for the U.S. Congress, not state legislatures or city councils, to consider when deciding upon the future of the voluntary, experimental E-Verify system.

C. The Oklahoma Act Conflicts With Congressional Intent for Federal, Uniform Regulation of Employment of Alien Workers

As noted in the briefs filed by appellees and other amici, Oklahoma is just one of a growing number of states (and municipalities) that have passed, or are considering, laws sanctioning the employment of unauthorized aliens.[15] Some of

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[14] http://www.cbo.gov/ftpdocs/91xx/doc9100/hr4088ltr.pdf

[15] The other states that require the use of E-Verify for public and/or private employers, through legislation or Executive Orders include Arizona, Arkansas, Colorado, Georgia, Idaho, Minnesota, Mississippi, Missouri, North Carolina, Rhode Island, South Carolina and Utah. The Pew Charitable Trusts has documented the "cacophony" of such state and local laws enacted or proposed just in the past year. Daniel C. Vock, *On the Front Lines: States Rush to Fill the Void on Immigration Policy*, State of the

(continued...)

these schemes have much in common, but others are very different. As these different schemes proliferate, it becomes increasingly difficult for an employer doing business in multiple states to navigate the web of conflicting requirements. These statutes and ordinances impose a wide variety of inconsistent verification requirements. For example, some require use of E-Verify. Others require employers to use a state-created "Status Verification System." And some states restrict the number and types of documents employers can use to verify work authorization status to those approved by state authorities.

This growing patchwork of inconsistent laws imposes significant hardships on businesses that operate in more than one state. As amply demonstrated in appellees' Brief (pp. 4-8, 55-67), the regulatory quagmire that is now developing squarely conflicts with the intent of Congress when it enacted IRCA in 1986 - Congress intended to create a nationally uniform and comprehensive federal system for regulating the employment of alien workers. *See e.g.,* Immigration Reform and Control Act of 1986 ("IRCA") Pub. L. No. 99-603, 100 Stat. 3359, § 115(stating that the "immigration laws of the United States should be enforced vigorously and uniformly."); H.R. Rep. No. 99-682(I) at 58, 1986 USCCAN at 5662 (legislative history of IRCA discussing allowing state

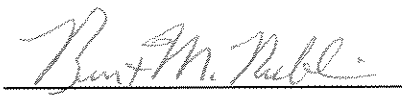
(...continued)
States Report-2008 at 56-62, *available at* http://archive.stateline.org/flash-data/StateOfTheStates2008.pdf.

sanctions against "any person who has been found to have violated the sanctions provisions in [IRCA]."); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (finding that the uniform national rules that Congress enacted in IRCA definitively moved such regulation to the federal realm by "forcefully mak[ing] combating the employment of illegal aliens central to the policy of immigration law.").

CONCLUSION

For the foregoing reasons and the reasons stated in Appellees' brief, the decision below should be affirmed.

Respectfully submitted,



Burt M. Rublin
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Phone: 215-864-8116

and

David A. Selden
Julie A. Pace
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
3300 Tower, Suite 1800
3300 North Central Avenue
Phoenix, AZ 85012-2518
Phone: 602-798-5400

Attorneys for Amici Curiae
The Human Resource Initiative
For a Legal Workforce and
Associated Builders and
Contractors, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(B), this Brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,905 words.

October 23, 2008

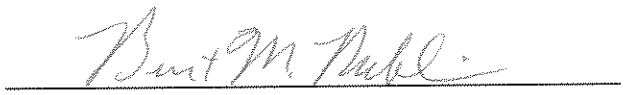
Burt M. Rublin

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that:

1. There are no privacy redactions made to this Brief;
2. The hard copy and electronic copy of this Brief are identical; and
3. The electronic copy of this Brief has been checked for viruses using McAfee VirusScan Enterprise 8.5i, and is free of viruses according to that program.

October 23, 2008



Burt M. Rublin

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2008, I caused the foregoing Amicus Curiae Brief of the Human Resource Initiative For a Legal Workforce and Associated Builders and Contractors, Inc., to be filed with the United States Court of Appeals for the Tenth Circuit by electronic transmission to esubmission@ca10.uscourts.gov, with the original and seven copies filed with the Clerk by first-class mail.

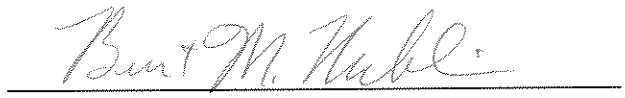
On the same date, I served the foregoing Brief by electronic transmission upon the following:

M. Daniel Weitman (dan.weitman@oag.ok.gov)
Kevin L. McClure (Kevin.mcclure@oag.ok.gov)
Sandra D. Rinehart (sandy.reinhart@oag.ok.gov)
Oklahoma Attorney General's Office
313 N.E. 21st Street
Oklahoma City, OK 73105

Guy L. Hurst (Ghurst@tax.ok.gov)
Assistant General Counsel
Oklahoma Tax Commission
120 North Robinson, Suite 2000W
Oklahoma City, OK 73102

Carter G. Phillips (cphillips@sidley.com)
Eric A. Shumsky
Robert A. Parker
Brian E. Nelson
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005

Robin S. Conrad (rconrad@uschamber.com)
Shane Brennan
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062



Burt M. Rublin