Congress of the United States

Washington, DC 20515

June 24, 2010

The Honorable Jeff Sessions
Ranking Member
Senate Judiciary Committee
326 Russell Senate Office Building
Washington, DC 20510 -0104

Dear Senator Sessions,

We write to express our concern about the Obama Administration's recent challenge to a 2007 Arizona law that requires all Arizona employers to use the federal government's E-Verify program to check the legal status of new employees.

On May 28th, 2010, the Obama Administration submitted an amicus brief to the Supreme Court claiming certain provisions of the Legal Arizona Workers Act are pre-empted by Federal law. After careful review of the relevant Federal law it appears the Administration has no legal foundation on which to base their recommendation and is, in effect, asking the Supreme Court to engage in judicial activism. We are concerned that this is another end run around the proper legislative process, attempting to accomplish in the courts what cannot be done at the ballot box. Consequently, a number of us sent a letter (attached) to Attorney General Holder asking him to withdraw the brief.

In 2007, then Arizona Governor Janet Napolitano signed the Legal Arizona Workers Act, subjecting employers who intentionally or knowingly hire or employ illegal immigrants to mandatory suspension of their business licenses for first offenses and permanent revocation of their business licenses for second offenses.

This provision is in accord with federal immigration law that expressly allows states use of licensing sanctions to control employment of illegal aliens. In fact, 8 U.S.C. 1324a, the provision of Federal law that makes it unlawful to hire illegal immigrants, specifically says "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."

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This law has already withstood challenge in both the District Court of Arizona and the Ninth Circuit Court of Appeals. Both courts recognized that Federal law expressly allows States use of licensing laws to ensure that employers follow the Federal law prohibiting them from hiring illegal aliens.

It has come to our attention that Supreme Court nominee Elena Kagan played a key role in authorizing the brief. According to a supplemental document she submitted to the Senate Judiciary Committee, Ms. Kagan indicated that it was she who, on April 12, 2010, recommended the government take the position that the Arizona law is pre-empted by Federal law.

Though the final brief was submitted after Ms. Kagan had resigned her position as Solicitor General and does not include her signature, it is clear that she ultimately approved the position taken by those who authored the brief. Because this case could likely be heard by the Supreme Court, it is imperative that we know the extent of Ms. Kagan's involvement in writing the brief, as well as the rationale behind her direct contravention of the letter of the law.

We are concerned that this is another instance in which Ms. Kagan's legal reasoning took a backseat to her personal political philosophy, and we urge you to question her about this issue during her upcoming Supreme Court confirmation hearing.

Sincerely,

Lamar Smith

Gary Miller

Jack Kingston

F. James Sensenbrenner

Brian Bilbray

Phil Gingrey

Paul Broun

Todd Tiahrt

Steve King

Jerry Moran

Sam Johnson

Ed Royce

Dana Rohrabacher

Trent Franks

Enclosure