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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs/Appellants,

vs.

CRISS CANDELARIA, *et al.*,

Defendants/Appellees.

And consolidated cases.

# PLAINTIFFS/APPELLANTS' CONSOLIDATED OPENING BRIEF


DANIEL POCHODA
ACLU Foundation of Arizona
P.O. Box 17148
Phoenix, AZ 85011
Telephone: (602) 650-1854

PAUL F. ECKSTEIN
JOEL W. NOMKIN
CHARLES A. BLANCHARD
Perkins Coie Brown & Bain P.A.
2901 North Central Avenue
Post Office Box 400
Phoenix, AZ 85001
Telephone: (602) 351-8000

(Complete Counsel Listing and Parties Represented on Signature Pages)

STEPHEN P. BERZON
JONATHAN WEISSGLASS
REBECCA SMULLIN
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151

BURT M. RUBLIN
DAVID A. SELDEN
JULIE A. PACE
DOUGLAS L. FLITTER
Ballard Spahr Andrews
& Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: (215) 665-8500

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs/Appellants,

vs.

CRISS CANDELARIA, *et al.*,

Defendants/Appellees.

And consolidated cases.

# PLAINTIFFS/APPELLANTS' CONSOLIDATED OPENING BRIEF


DANIEL POCHODA
ACLU Foundation of Arizona
P.O. Box 17148
Phoenix, AZ 85011
Telephone: (602) 650-1854

PAUL F. ECKSTEIN
JOEL W. NOMKIN
CHARLES A. BLANCHARD
Perkins Coie Brown & Bain P.A.
2901 North Central Avenue
Post Office Box 400
Phoenix, AZ 85001
Telephone: (602) 351-8000

(Complete Counsel Listing and Parties Represented on Signature Pages)

STEPHEN P. BERZON
JONATHAN WEISSGLASS
REBECCA SMULLIN
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151

BURT M. RUBLIN
DAVID A. SELDEN
JULIE A. PACE
DOUGLAS L. FLITTER
Ballard Spahr Andrews
& Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: (215) 665-8500

## CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly-held corporations that own 10% or more of the stock of any of Plaintiffs/Appellants.

## TABLE OF CONTENTS


CORPORATE DISCLOSURE STATEMENT ..... i

TABLE OF AUTHORITIES ..... v

INTRODUCTION ..... 1

STATEMENT OF JURISDICTION ..... 1

ISSUES PRESENTED ..... 2

STATEMENT OF THE CASE ..... 3

STATEMENT OF FACTS ..... 6

A. Federal Immigration Law ..... 6

B. Arizona's Immigration Law ..... 10

SUMMARY OF ARGUMENT ..... 13

STANDARD OF REVIEW ..... 15

ARGUMENT ..... 15

I. THE ARIZONA ACT IS PREEMPTED ..... 15

A. IRCA Expressly Preempts The Arizona Act's Employer Sanctions ..... 19

1. IRCA's Express Preemption Provision Reflects Congress' Enactment Of Comprehensive Regulation Of Unauthorized Employment ..... 20

2. IRCA's Savings Clause Does Not Authorize The Arizona Act ..... 22

a. The Savings Clause Does Not Give States Authority To Make Their Own Determinations Regarding Whether An Employee Is Authorized To Work In This Country ..... 23

b. The Arizona Act Does Not Constitute A Permissible "Licensing" Provision ..... 28

3. IRCA's Amendment Of Other Provisions And Its Legislative History Reinforce That The Arizona Act Is Expressly Preempted ..... 30

B. The Arizona Act Is Preempted Because It Conflicts With Federal Law ..... 34

1. Conflict Preemption Is An Independent Basis For Invalidating The Arizona Act ..... 35

2. The Arizona Act's Mandate Of E-Verify Participation Conflicts With Federal Law ..... 38

3. The Arizona Act's Employer Sanctions Scheme Conflicts With The Comprehensive Federal System .. 44

II. THE ARIZONA ACT VIOLATES DUE PROCESS ..... 53

III. PLAINTIFFS HAVE STANDING ..... 58

CONCLUSION ..... 61

CERTIFICATE OF COMPLIANCE ..... 64

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Aetna Health Inc. v. Davila*,
542 U.S. 200 (2004) ..... 20

*Alessi v. Raybestos-Manhattan, Inc.*,
451 U.S. 504 (1981) ..... 25

*American Insurance Association v. Garamendi*,
539 U.S. 396 (2003) ..... 51

*Bank of America v. City and County of San Francisco*,
309 F.3d 551 (9th Cir. 2002) ..... 37

*Bell v. Burson*,
402 U.S. 535 (1971) ..... 55

*Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,
489 U.S. 141 (1989) ..... 43

*Bruce v. United States*,
759 F.2d 755 (9th Cir. 1985) ..... 15

*Buckman Co. v. Plaintiffs' Legal Committee*,
531 U.S. 341 (2001) ..... 43

*Burr v. INS*,
350 F.2d 87 (9th Cir. 1965) ..... 45

*Cleveland Board of Education v. Loudermill*,
470 U.S. 532 (1985) ..... 53, 54

*Collins Foods International, Inc. v. INS*,
948 F.2d 549 (9th Cir. 1991) ..... 17, 48

*Crandon v. United States*,
494 U.S. 152 (1990) ..... 23

*Credit Suisse First Boston Corp. v. Grunwald*,
400 F.3d 1119 (9th Cir. 2005) ..... 37, 44

*Crosby v. National Foreign Trade Council*,
530 U.S. 363 (2000) ..... 15, 51, 53

*De Canas v. Bica*,
424 U.S. 351 (1976) ..... 20, 21

*El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*,
959 F.2d 742 (9th Cir. 1992) ..... 61

*Fidelity Federal Sav. and Loan Association v. de la Cuesta*,
458 U.S. 141 (1982) ..... 40

*Gade v. National Solid Wastes Mgt. Association*,
505 U.S. 88 (1992) ..... 37

*Garner v. Teamsters Local Union No. 776*,
346 U.S. 485 (1953) ..... 45, 48

*Garrett v. City of Escondido*,
465 F. Supp. 2d 1043 (S.D. Cal. 2006) ..... 43, 47

*Geier v. American Honda Motor Co., Inc.*,
529 U.S. 861 (2000) ..... *passim*

*Goldberg v. Kelly*,
397 U.S. 254 (1970) ..... 57

*Graham v. Richardson*,
403 U.S. 365 (1971) ..... 16

*Gray v. City of Valley Park*,
2008 WL. 294294 (E.D. Mo. Jan. 31, 2008) ..... 27

*Green Mountain R.R. Corp. v. Vermont*,
404 F.3d 638 (2d Cir. 2005) ..... 28

*Greene v. McElroy*,
360 U.S. 474 (1959) ..... 54

*Havens Realty Corp. v. Coleman*,
455 U.S. 363 (1982) ..... 61

*Hines v. Davidowitz*,
312 U.S. 52 (1941) ..... 16, 48

*Hoffman Plastic Compounds, Inc. v. NLRB*,
535 U.S. 137 (2002) ..... 13, 18, 21

*International Paper Co. v. Ouellette*,
479 U.S. 481 (1987) ..... *passim*

*Leipart v. Guardian Industries, Inc.*,
234 F.3d 1063 (9th Cir. 2000) ..... 36

*Lozano v. City of Hazleton*,
496 F. Supp. 2d 477 (M.D. Pa. 2007) ..... 27, 50, 51

*Mathews v. Eldridge*,
424 U.S. 319 (1976) ..... 53, 54

*Miller v. French*,
530 U.S. 327 (2000) ..... 56

*Montalvo v. Spirit Airlines*,
508 F.3d 464 (9th Cir. 2007) ..... 44

*NCAA v. Miller*,
10 F.3d 633 (9th Cir. 1993) ..... 15

*National Audubon Society, Inc. v. Davis*,
307 F.3d 835 (9th Cir.), amended
by 312 F.3d 416 (9th Cir. 2002) ..... 58, 59, 60, 61

*National Ctr. for Immigrants' Rights, Inc. v. INS*,
913 F.2d 1350 (9th Cir. 1990),
rev'd on other grounds, 502 U.S. 183 (1991) ..... 17

*Omega World Travel, Inc. v. Mummagraphics, Inc.*,
469 F.3d 348 (4th Cir. 2006) ..... 29

*Pilot Life Insurance Co. v. Dedeaux*,
481 U.S. 41 (1987) ..... 23, 28

*Preston v. Ferrer*,
128 S. Ct. 978 (2008) ..... 48

*Ray v. Atlantic Richfield Co.*,
435 U.S. 151 (1978) ..... 45

*Rogers v. Larson*,
563 F.2d 617 (3d Cir. 1977) ..... 34

*Rowe v. New Hampshire Motor Trans. Association*,
128 S. Ct. 989 (2008) ..... 27

*Sprietsma v. Mercury Marine*,
537 U.S. 51 (2002) ..... 36

*Steel Co. v. Citizens for a Better Environment*,
523 U.S. 83 (1998) ..... 58

*Takahashi v. Fish & Game Commission*,
334 U.S. 410 (1948) ..... 16

*Taylor v. Westly*,
488 F.3d 1197 (9th Cir. 2007) ..... 57

*Ting v. AT&T*,
319 F.3d 1126 (9th Cir. 2003) ..... 37

*Toll v. Moreno*,
458 U.S. 1 (1982) ..... 15, 17

*United States v. Locke*,
529 U.S. 89 (2000) ..... 20, 24, 41

*Watters v. Wachovia Bank*,
127 S. Ct. 1559 (2007) ..... 27

*Wedges/Ledges of Cal., Inc. v. City of Phoenix*,
24 F.3d 56 (9th Cir. 1994) ..... 54

*Zadvydas v. Davis*,
533 U.S. 678 (2001) ..... 16

**STATE CASES**

*Hudson v. Kelly*,
263 P.2d 362 (Ariz. 1953) ..... 44

*Mejak v. Granville*,
136 P.3d 874 (Ariz. 2006) ..... 56

**FEDERAL CONSTITUTION, STATUTES, AND REGULATIONS**

United States Constitution, Article VI, Section 2 ..... 15

8 U.S.C. §1324a ..... 3, 6, 11

8 U.S.C. §1324a(a)(1)(A) ..... 6

8 U.S.C. §1324a(a)(3) ..... 7, 51

8 U.S.C. §1324a(b)(1) ..... 6

8 U.S.C. §1324a(b)(1)(A) ..... 7

8 U.S.C. §1324a(b)(5) ..... 52

8 U.S.C. §1324a(b)(6) ..... 7

8 U.S.C. §1324a(d)(3) ..... 8

8 U.S.C. §1324a(e) ..... 24, 46

8 U.S.C. §1324a(e)(1)(B) ..... 47, 50

8 U.S.C. §1324a(e)(2) ..... 7, 44, 47

8 U.S.C. §1324a(e)(3) ..... 7, 44, 47

8 U.S.C. §1324a(e)(4) ..... 7, 48

8 U.S.C. §1324a(e)(7) ..... 7, 44, 47

8 U.S.C. §1324a(e)(8) ..... 7, 44, 47

8 U.S.C. §1324a(f) ..... 7

8 U.S.C. §1324a(h)(2) ..... *passim*

8 U.S.C. §1324b ..... 8

8 U.S.C. §1324b(a)(1) ..... 50

8 U.S.C. §1324b(a)(2) ..... 50

8 U.S.C. §1324b(c) ..... 50

8 U.S.C. §1324b(d) ..... 50

8 U.S.C. §1324b(d)(1) ..... 50

8 U.S.C. §1373(c) ..... *passim*

28 U.S.C. §1291 ..... 2

28 U.S.C. §1331 ..... 2

29 U.S.C. §1801 ..... 30

29 U.S.C. §1816 ..... 31

29 U.S.C. §1871 ..... 31

Basic Pilot Extension Act of 2001,
Pub. L. No. 107-128, 115 Stat. 2407 (2002) ..... 39

Basic Pilot Program Extension and Expansion Act of 2003,
Pub. L. No. 108-156, 117 Stat. 1944 (2003) ..... 39

Immigration Reform and Control Act of 1986 ("IRCA"),
Pub. L. No. 99-603, 100 Stat. 3359 ..... *passim*

Immigration Reform and Immigrant Responsibility Act of 1996,
Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 ..... 3, 8, 39

8 C.F.R. §274a.1-14 ..... 6

8 C.F.R. §274a.2(a)(2) ..... 6

8 C.F.R. §274a.9(b) ..... 47, 50

8 C.F.R. §274a.12(b) ..... 46

8 C.F.R. §274a.12(b)(13) ..... 46

8 C.F.R. §274a.12(b)(14) ..... 46

8 C.F.R. §274a.12(b)(20) ..... 46

8 C.F.R. §274a.12(c)(8) ..... 46

8 C.F.R. §274a.12(c)(9) ..... 46

8 C.F.R. §274a.12(c)(10) ..... 46

8 C.F.R. §274a.2(a)(3) ..... 6

8 C.F.R. §274a.10(b)(1)(ii) ..... 7

69 Fed. Reg. 75,997 (Dec. 20, 2004) ..... 39

73 Fed. Reg. 10,130 (Feb. 26, 2008) ..... 7

**FEDERAL LEGISLATIVE HISTORY**

H.R. Conf. Rep. No. 99-682(I) (1986), 1986 U.S.C.C.A.N. 5649 ..... *passim*

H.R. Conf. Rep. No. 99-682(II) (1986), 1986 U.S.C.C.A.N. 5757 ..... 49

H.R. Conf. Rep. No. 99-1000 (1986), 1986 U.S.C.C.A.N. 5840, ..... 49

131 Cong. Rec. S11414-03 ..... 18

132 Cong. Rec. H9708-02 ..... 17

H.R. 19, 110th Cong. (2007) ..... 40

H.R. 4437, 109th Cong. (2005) ..... 40

S. 1348, 110th Cong. (2007) ..... 40

S. 2611, 109th Cong. (2006) ..... 40

**STATE STATUTES AND LOCAL ORDINANCES**

Ariz. R. Civ. P. 65.2(i) ..... 56

Ariz. Rev. Stat. §23-211(4) ..... 11

Ariz. Rev. Stat. §23-211(7) ..... 11, 28

Ariz. Rev. Stat. §23-211(8) ..... 11

Ariz. Rev. Stat. §23-212 ..... 3, 10, 60

Ariz. Rev. Stat. §23-212(A) ..... 11

Ariz. Rev. Stat. §23-212(B) ..... *passim*

Ariz. Rev. Stat. §23-212(C)(1) ..... 11

Ariz. Rev. Stat. §23-212(C)(2) ..... 11

Ariz. Rev. Stat. §23-212(C)(3) ..... 12, 60

Ariz. Rev. Stat. §23-212(D) ..... *passim*

Ariz. Rev. Stat. §23-212(F) ..... 48

Ariz. Rev. Stat. §23-212(F)(1)(b) ..... 12

Ariz. Rev. Stat. §23-212(F)(1)(c) ..... 12, 49

Ariz. Rev. Stat. §23-212(F)(1)(d) ..... 12, 49

Ariz. Rev. Stat. §23-212(F)(2)(b) ..... 12

Ariz. Rev. Stat. §23-212(F)(2)(c) ..... 12

Ariz. Rev. Stat. §23-212(F)(2)(d) ..... 12

Ariz. Rev. Stat. §23-212(F)(3) ..... 12

Ariz. Rev. Stat. §23-212(H) ..... *passim*

Ariz. Rev. Stat. §23-212(I) ..... 44

Ariz. Rev. Stat. §23-212(J) ..... 52

Ariz. Rev. Stat. §23-214 ..... *passim*

Ariz. Rev. Stat. §41-1461(4) ..... 50

Ariz. Rev. Stat. §41-193(A) ..... 60

Ariz. Rev. Stat. §1463(B) ..... 50

Cal. Lab. Code §1690(6) ..... 31

City of Hazelton, Pa. Ordinance No. 2006-18 (Sept. 21, 2006) ..... 27

City of Hazelton, Pa. Ordinance No. 2006-40 (Dec. 28, 2008) ..... 27

City of Valley Park, Mo. Ordinance 1722 (Feb. 14, 2007) ..... 26

Illinois Public Act 095-0138 (2007), 820 Ill. Comp. Stat. §55/12 ..... 27

La. Rev. Stat. §23:911 et seq ..... 26

Mississippi Employment Protection Act of 2008,
S.B. 2988, 2008 Reg. Sess. (Miss. 2008) ..... 26

N.J.S.A. §34:8A-11 ..... 31

25 Okla. Stat. §1313 ..... 26

43 P.S. §1301.501 et seq ..... 31

43 P.S. §1301.503(1) ..... 31

43 P.S. §1301.505(3) ..... 31

Tenn. Code §50-1-103 ..... 26

W. Va. Code §21-1B-1 et seq ..... 26

**STATE LEGISLATIVE HISTORY**

A.B. 2421, 2007-08 Reg. Sess. (Cal. 2008) ..... 26

S.B. 08-083, 66th Gen. Assem., 2nd Reg. Sess. (Colo. 2008) ..... 26

S.B. 0335, 115th Gen. Assem., 2nd Reg. Sess (Ind. 2008) ..... 26

S.B. 458, 82nd Legis., 2008 Reg. Sess. (Kan. 2008) ..... 26

H.B. 304, 2008 Reg. Sess. (Ky. 2008) ..... 26

H.B. 5718, 95th Gen. Assem. (Ill. 2008) ..... 26

H.B. 1103, 2008 Reg. Sess. (La. 2008) . . . . . 26

H.B. 1381, 94th Gen. Assem., 2nd Reg. Sess. (Mo. 2008) . . . . . 26

S.B. 1312, 213th Legis., 1st Reg. Sess. (N.J. 2008) . . . . . 26

S.B. 979, 191st Gen Assem., 2007 Reg. Sess. (Penn. 2007) . . . . . 26

**MISCELLANEOUS**

22 Weekly Comp. of Pres. Doc. 1534, 1986 U.S.C.C.A.N. 5856-1 . . . . . 16

## INTRODUCTION

In 1986, after years of debate, Congress added a comprehensive national system of employer sanctions to this country's immigration laws that penalizes employers for employing unauthorized workers. Carefully balancing numerous objectives, that federal system establishes a uniform employee verification standard that every employer must follow, specifies the procedures for determining a violation, and prescribes the penalties that may be imposed. Ten years later, in 1996, Congress added a voluntary program for employers to verify work authorization status electronically if they choose to enroll.

Dissatisfied with federal law and frustrated that Congress has not changed it, Arizona has enacted a statute that seeks to impose different standards, procedures, and penalties on Arizona employers, and provides for state determinations of work authorization status. Arizona has also mandated employer participation in the federal electronic verification program that Congress made voluntary. Arizona's attempt to override Congress' choices is preempted. If Arizona's law is allowed, there would be no limit to the conflicting and divergent laws that states and localities would be free to impose in derogation of federal law.

## STATEMENT OF JURISDICTION

This matter involves five consolidated appeals. In Case Nos. 07-17274 and 07-17272, Plaintiffs/Appellants appeal from a December 10, 2007 amended order and December 7, 2007 final judgment, as to which Plaintiffs filed Notices of Appeal on December 13, 2007.

In Case Nos. 08-15357, 08-15359, and 08-15360, Plaintiffs appeal from a February 7, 2008 order and final judgment, as to which Plaintiffs filed Notices of Appeal on February 8, 2008.

The district court had subject matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§1331 and 1343. Plaintiffs' appeals are timely. F.R.A.P. 4(a)(1)(A). This Court has jurisdiction pursuant to 28 U.S.C. §1291.

## ISSUES PRESENTED

1. Whether federal law preempts Arizona's enactment of (i) a state scheme to sanction employers deemed by state procedures to have employed unauthorized aliens, despite the federal government's comprehensive and carefully balanced employer sanctions system, and (ii) a requirement that all Arizona employers use a federal Internet program to verify employees' work authorization status, despite federal law providing that employer participation in that program is voluntary.

2. Whether Arizona's scheme to sanction employers for hiring unauthorized workers violates due process by prohibiting an employer from meaningfully contesting an employee's work authorization status prior to revocation of the employer's business license or other sanctions.

3. Whether the district court erred in dismissing claims against state officials who are charged with implementing and enforcing the challenged statutory provisions for lack of standing.

## STATEMENT OF THE CASE

On July 2, 2007, the Governor of Arizona signed into law the Legal Arizona Workers Act. ER 287. Section 2 of the Act contains two interrelated provisions. First, it establishes a state-wide scheme for sanctioning employers that allegedly employ aliens who are unauthorized to work. Ariz. Rev. Stat. §23-212. That scheme differs markedly from the uniform employer sanctions system Congress enacted as part of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, 8 U.S.C. §§1324a-1324b. Second, the Act imposes a mandatory obligation on every Arizona employer to participate in the federal Basic Pilot Program for checking employment eligibility. Ariz. Rev. Stat. §23-214. Congress, however, specified that this program (now known as "E-Verify") is *voluntary*. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, note following 8 U.S.C. §1324a.

Two groups of plaintiffs challenged the Act in the District of Arizona, raising primarily preemption and due process claims. The first case, No. CV-07-1355-PHX-NVW, was filed on July 13, 2007. ER 879 (Docket #1). That case was brought on behalf of the Arizona Contractors Association, the United States Chamber of Commerce, Wake Up Arizona! Inc., and other business associations against Arizona Governor Janet Napolitano and Arizona Attorney General Terry Goddard. ER 216-52. Separately, on September 4, 2007, Chicanos Por La Causa, Inc., and Somos America filed suit against Governor Napolitano,

Attorney General Goddard, and Director of the Arizona Department of Revenue Gale Garriott in No. CV-07-1684-PHX-NVW. ER 200-15.

The district court consolidated the two cases (together, "*Arizona I*"). ER 883 (Docket #36). After a trial on written evidence (ER 124:6-9), the district court dismissed *Arizona I* on December 7, 2007 (and amended the ruling on December 10, 2007). ER 889-90 (Docket #84-87), ER 94-120. The court ruled that Plaintiffs lacked standing to sue state officials charged with implementing the Act, but would have standing to sue Arizona County Attorneys. ER 95:23-96:21, 103:11-21, 108:13-118:10. Plaintiffs appealed the district court's ruling. ER 194-99.

As a protective measure, on December 9, 2007, the business associations brought a new case (No. CV-07-2496-PHX-NVW) against the 15 Arizona County Attorneys, Attorney General Goddard, and Director of the Arizona Registrar of Contractors Fidelis Garcia. ER 151-93. Similarly, on December 12, 2007, Valle del Sol, Inc., joined Chicanos Por La Causa and Somos America in filing a new suit (No. CV-07-2518-PHX-NVW) naming Maricopa County Attorney Andrew Thomas as a defendant along with Attorney General Goddard and Department of Revenue Director Garriott. ER 133-50. The district court again consolidated the two new cases (together, "*Arizona II*"). ER 925 (Docket #29).

On December 21, 2007, the district court denied motions for an injunction pending appeal in *Arizona I*, and denied requests for a temporary restraining order in *Arizona II*. ER 60-93. The same day, this Court deferred ruling on motions for

an injunction pending appeal in *Arizona I* until the district court ruled in *Arizona II*.

On January 16, 2008, the district court held a trial on written submissions in *Arizona II*. ER 57:17-20.[1] On February 7, 2008, the district court ruled against Plaintiffs. ER 13-52. The district court first incorporated its standing ruling from *Arizona I*. ER 19:4-7. Because the court had concluded that Plaintiffs have standing to sue the County Attorneys, the court reached the merits.

The district court held that the Arizona Act was not preempted. The court concluded that IRCA's express preemption provision does not bar the Act based on a broad reading of a parenthetical savings clause. ER 25:14-35:4. The district court further concluded that the Arizona Act did not conflict with federal law. ER 36:17-44:3. The court saw no conflict in the Act's universal mandate to employers to use the federal electronic verification program even though it is "voluntary under federal law." ER 41:17-44:3. The court also saw no conflict in Arizona creating its own adjudication and enforcement scheme that is separate from the uniform system Congress created, and could generate conflicting results. ER 36:17-41:16.

The district court also held that Arizona's Act comports with due process, rejecting Plaintiffs' contention that a provision of the Act (Ariz. Rev. Stat.

---

[1] The parties entered into a Joint Statement of Stipulated Facts, which included facts and documents, and incorporated a similar stipulation from *Arizona I*. ER 253-54.

§23-212(H)) compels Arizona courts to rely on a determination of worker status without any meaningful hearing to contest that finding. ER 44:4-50:12.

Plaintiffs appealed. ER 126-32. On February 19, 2008, the district court denied motions for injunction pending appeal in *Arizona II*. ER 1-12. On February 28, 2008, this Court also denied an injunction pending appeal. The Court consolidated the cases on appeal and expedited the appeal.

## STATEMENT OF FACTS

### A. Federal Immigration Law

1. Central to any analysis of Arizona's Act is a review of the comprehensive federal system Congress enacted more than two decades ago to govern employment verification and prohibit hiring unauthorized aliens. In 1986, IRCA amended the Immigration and Nationality Act ("INA") to alter fundamentally the federal government's regulation of immigration by establishing a complex, carefully-balanced, nationally-uniform, and comprehensive federal system for regulating the employment of aliens. 8 U.S.C. §§1324a-1324b; *see also* 8 C.F.R. §274a.1-14.

IRCA made it unlawful to employ an alien "knowing the alien is an unauthorized alien" (8 U.S.C. §1324a(a)(1)(A)), and established an "employment verification system" (commonly known as the "I-9 process") that requires potential employees to provide documents establishing identity and employment authorization, and requires employers to execute an I-9 form. 8 U.S.C. §1324a(b)(1); 8 C.F.R. §274a.2(a)(2), (3). Under IRCA, an employer's

compliance in good faith with the I-9 process is a defense to liability, despite any technical or procedural failures. 8 U.S.C. §1324a(a)(3), (b)(6); *see also* 8 U.S.C. §1324a(b)(1)(A) (employer need only determine new hire's documents reasonably appear to be genuine).

IRCA further amended the INA to establish a detailed hearing and adjudication process for determining whether an employer knowingly hired an unauthorized worker. There must be notice, an opportunity for an evidentiary hearing before a federal administrative law judge under procedures governed by the federal Administrative Procedure Act, a finding that a knowing violation has occurred based on a preponderance of the evidence, an opportunity for an administrative appeal, and the right to review in the federal Courts of Appeals. 8 U.S.C. §1324a(e)(2)-(3), (7)-(8).

IRCA included sanctions that an administrative law judge may impose against an employer who is found to have violated the law. 8 U.S.C. §1324a(e)(4), (f). An offending employer is subject to a graduated system of civil penalties that, as subsequently adjusted for inflation, range from $375 per unauthorized alien for the first violation to no more than $16,000 for third and subsequent violations. 8 U.S.C. §1324a(e)(4); 8 C.F.R. §274a.10(b)(1)(ii); 73 Fed. Reg. 10,130, 10,133 (Feb. 26, 2008). Pattern or practice violators are subject to civil injunctions brought by the Attorney General in federal district court, and criminal prosecution with penalties of up to $3,000 per unauthorized alien and a total prison term not to exceed six months. 8 U.S.C. §1324a(f).

IRCA also enacted detailed anti-discrimination provisions with separate penalties for employers who require different or additional documents or engage in other discriminatory acts. 8 U.S.C. §1324b.

In furtherance of its intent to displace state law, Congress included an express preemption provision in IRCA to "preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws)" on employers. 8 U.S.C. §1324a(h)(2). Congress also provided that the executive branch could not make a "major change" to IRCA's verification process without congressional approval, and even minor changes required 60 days notice to Congress. 8 U.S.C. §1324a(d)(3).

2. Ten years after IRCA, Congress enacted through IIRIRA a *voluntary* and *experimental* system called the "Basic Pilot Program." §403(a), 8 U.S.C. §1324a note. That program – recently renamed "E-Verify" – allows employers choosing to enroll to check a new hire's work authorization over the Internet. ER 310, 661, 663. Congress expressly made the program *voluntary*, providing that any employer "*may elect* to participate in that pilot program" and that the government "*may not require* any person or other entity to participate." IIRIRA, §402(a), 8 U.S.C. §1324a note (entitled "Voluntary Election"; emphases added). E-Verify is also *experimental*. A September 2007 evaluation of the program, commissioned by the Department of Homeland Security ("DHS") (ER 660), notes that the program was intended "to test alternative types of electronic verification

systems before considering the desirability and nature of implementing any larger scale employment verification programs." ER 633; *see also* ER 372, 649, 654.

Employers who opt to enroll in E-Verify must learn how to use it; register for the program, which includes signing a Memorandum of Understanding ("MOU") with federal agencies; complete a tutorial; pass a multiple-choice test; and submit for all new hires data such as employee name, date of birth, and Social Security number. *E.g.*, ER 304-06, 310-11, 509, 515, 662.

E-Verify primarily operates by electronically comparing data entered by employers to information in Social Security Administration ("SSA") and DHS databases. *See generally* ER 539-43, 663-66. If the data do not match, E-Verify issues a "tentative non-confirmation"; if an employee does not contest the tentative non-confirmation within eight working days, the employer must either terminate the employee or notify DHS that the employer is not doing so. *See id.*

E-Verify has high levels of erroneous tentative non-confirmations due to widespread errors in the underlying government databases and a lack of employer compliance with program rules; these problems reduce effectiveness and contribute to discrimination. *E.g.*, ER 374, 640-42, 721-22. The September 2007 evaluation of E-Verify found that "the database used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification, especially for naturalized citizens." ER 639; *see also* ER 387-88 (federal government audit finding more than a third of individuals that SSA's database

indicated were not work authorized were actually authorized); ER 438 (2006 federal study finding across-the-board error rate of 4%).

Under E-Verify, one in ten properly authorized non-citizens are initially categorized as *not* having work authorization, almost 10% of naturalized U.S. citizens are initially issued a tentative non-confirmation, and foreign-born work-authorized employees are 30 times more likely than native-born workers to receive erroneous tentative non-confirmations. ER 511, 749. According to the September 2007 evaluation: "Reducing the erroneous tentative nonconfirmation rate for naturalized citizens will take considerable time." ER 644.

**B. Arizona's Immigration Law**

Section 2 of the Legal Arizona Workers Act (ER 276-85) became operative on January 1, 2008. Ariz. Rev. Stat. §§23-212(D), 23-214. The Act was passed because of Arizona's dissatisfaction with federal immigration law. As the Governor acknowledged: "Immigration is a federal responsibility, but I signed House Bill 2779 because it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs." ER 287. The Act imposes draconian sanctions against employers the state decides, through its own mechanism and without requiring any federal adjudication, have intentionally or knowingly employed an unauthorized alien. *See* Ariz. Rev. Stat. §23-212. The Act also *mandates* that all employers in the state enroll in the voluntary federal E-Verify program to check employment eligibility of their employees. Ariz. Rev. Stat. §23-214.

1. Section 23-212 provides: "An employer shall not intentionally employ an unauthorized alien or knowingly employ an unauthorized alien." Ariz. Rev. Stat. §23-212(A). An "unauthorized alien" is an alien who does not have the right to work in the United States as defined in federal law. Ariz. Rev. Stat. §23-211(8). An "employer" transacts business in Arizona, has a state license, and employs at least one person for employment services in Arizona. Ariz. Rev. Stat. §23-211(4). A "license" is broadly defined: "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law" and is issued "for the purposes of operating a business" in Arizona. Ariz. Rev. Stat. §23-211(7).

The Arizona Attorney General or County Attorney must investigate any complaint (from anyone, including anonymous complainants) that an employer is allegedly employing an unauthorized alien by utilizing 8 U.S.C. §1373(c). Ariz. Rev. Stat. §23-212(B). Section 1373(c), on which the Arizona Act relies, is separate from and unrelated to the procedures for determining unauthorized employment enacted by IRCA that are codified at 8 U.S.C. §1324a. Section 1373(c), which was enacted in 1996, permits state or local government inquiries about "citizenship or immigration status," *not* employment authorization.

Upon determining that a complaint is not frivolous, the Arizona Attorney General or County Attorney must notify immigration and law enforcement agencies of the allegedly unauthorized alien's presence. Ariz. Rev. Stat. §23-212(C)(1), (2). For all non-frivolous complaints to the Attorney General, the Act

also requires him to "notify the appropriate county attorney to bring an action pursuant to Subsection D" (Ariz. Rev. Stat. §23-212(C)(3)), which provides for actions against an employer in state court. Ariz. Rev. Stat. §23-212(D). Under the Act, Arizona judges determine whether an employee is authorized to work; in doing so, they may "*only*" consider the federal "determination" under 8 U.S.C. §1373(c). Ariz. Rev. Stat. §23-212(H) (emphasis added). The Act does not rely on a federal adjudication under IRCA.

Once the state mechanism determines that a violation has occurred, the Arizona Act imposes sanctions, including: (1) for the first violation, an employer is placed on probation for three or five years, during which the employer must file quarterly reports of new employees hired (Ariz. Rev. Stat. §23-212(F)(1)(b), (2)(b)); (2) also for the first violation, an employer must file a sworn affidavit that the employer has terminated all unauthorized workers (Ariz. Rev. Stat. §23-212(F)(1)(c), (2)(d)); and (3) all of the employer's "licenses," including basic organizing documents such as articles of incorporation, may be suspended for a knowing violation, must be suspended for an intentional violation, and, upon a second violation of any type during the probation period, must be permanently revoked (Ariz. Rev. Stat. §23-212(F)(1)(d), (2)(c), (3)). Governor Napolitano called this scheme "the most aggressive action in the country" and described license revocation as a "business death penalty." ER 291.

2. The Act also provides: "After December 31, 2007, every employer, after hiring an employee, shall verify the employment eligibility of the employee

through the basic pilot program [now E-Verify]." Ariz. Rev. Stat. §23-214. That is, although Congress made E-Verify voluntary, Arizona has mandated use of the program for all employers in the state. The Act will add 130,000-150,000 employers to E-Verify; Governor Napolitano admits this "could strain the system." ER 294.

## SUMMARY OF ARGUMENT

Arizona's Act imposes a sanctions scheme for employment of unauthorized aliens and mandates employer enrollment in a voluntary federal program. Both are contrary to congressional intent and preempted by federal immigration law.

In enacting IRCA in 1986, Congress fundamentally changed federal law through "a comprehensive scheme prohibiting the employment of unauthorized aliens in the United States" that "forcefully made combating the employment of illegal aliens central to [t]he policy of immigration law." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (internal quotation marks omitted). Congress enacted IRCA, after much debate and compromise, to impose uniform obligations on employers nationwide that reflected Congress' balance of multiple policy objectives. Congress' system both expressly and impliedly displaces state and local law.

IRCA's express preemption provision, 8 U.S.C. §1324a(h)(2), invalidates Arizona's Act notwithstanding the savings clause for "licensing and similar laws." That clause does not give states authority to erect their own broad employer sanctions schemes or their own mechanisms to determine whether an employer has

employed an unauthorized worker without regard to any federal finding under IRCA. The district court's contrary decision misreads §1324a(h)(2) and disregards the comprehensive and balanced federal employer sanctions system, Congress' expressed desire for uniformity, and the Supreme Court's admonition that preemption savings clauses are to be read narrowly and in light of the statute as a whole.

In addition, and independent of the express preemption provision, the Arizona Act conflicts with federal law. Conflict preemption must be rigorously applied and will invalidate a state statute that "stands as an obstacle" to the federal purpose, whether or not the challenged state law fits within a federal savings clause. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 869, 873-74 (2000). Even if the goals of federal and state law are the same, a state law "is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Arizona's Act, which was enacted because of disagreement with federal law, cannot withstand conflict preemption. Among other conflicts, the Act makes E-Verify mandatory for every Arizona employer even though Congress expressly made the program voluntary. Similarly, the Act's adjudication scheme is wholly separate from the federal procedure and, as the district court acknowledged, permits contrary results.

Finally, the Arizona Act violates due process because it deprives employers of a meaningful hearing. The basis for sanctions under the Act is a response from a federal database that an employer is barred from contesting.

## STANDARD OF REVIEW

This Court reviews *de novo* the district court's legal determinations on preemption, due process, and standing. *See NCAA v. Miller*, 10 F.3d 633, 637 (9th Cir. 1993); *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985).

## ARGUMENT

### I. THE ARIZONA ACT IS PREEMPTED

The power of Congress to preempt state law is a "fundamental principle of the Constitution" embodied in the Supremacy Clause, Article VI, Section 2. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). "[W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered," and what "must be implied is of no less force than that which is expressed." *Id.* at 373 (punctuation omitted). State law is preempted if a federal statute expressly so provides or if the state law conflicts with federal law. *Id.* at 372-73.

Preemption concerns are particularly acute when a state law relates to immigration, an area of uniquely federal responsibility. *Toll v. Moreno*, 458 U.S. 1, 10 (1982). In matters relating to immigration, there is a special need for nationwide consistency, given the "explicit constitutional requirement of uniformity" in Article I, §8, and the myriad problems that would result for citizens

and non-citizens alike if each of the 50 states – or each of thousands of localities – were permitted to adopt its own rules for the treatment of aliens. *See Graham v. Richardson*, 403 U.S. 365, 382 (1971); *see also Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (recognizing "Nation's need 'to speak with one voice' in immigration matters"); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) (laws relating to foreign nationals are intertwined with foreign relations).[2]

The Arizona Act cannot be reconciled with the federal employer sanctions system that has been part of this country's immigration laws for more than twenty years. Congress created that employer sanctions system in 1986 by enacting IRCA, which fundamentally changed federal immigration law by adding provisions penalizing employers who employ unauthorized aliens and establishing a uniform federal system for verifying the work authorization status of all new hires.

On signing IRCA, President Ronald Reagan declared it "the most comprehensive reform of our immigration laws since 1952," and called the employer sanctions provisions IRCA's "keystone and major element." Statement by President Ronald Reagan Upon Signing S. 1200, 22 Weekly Comp. of Pres. Doc. 1534, 1986 USCCAN 5856-1. IRCA was a product of years of intense

---

[2] The Supreme Court has repeatedly invalidated, under the Supremacy Clause, state laws that operate on the basis of immigration status. *See, e.g., Toll*, 458 U.S. at 10-17 (denial of in-state tuition to certain visa holders); *Graham*, 403 U.S. at 377-80 (welfare denial); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418-20 (1948) (denial of commercial fishing licenses); *Hines*, 312 U.S. at 62-74 (alien registration scheme).

debate. *See id.* at 4 ("The act I am signing today is the product of one of the longest and most difficult legislative undertakings of recent memory."); Peter H. Schuck, *Introduction: Immigration Law and Policy in the 1990's*, 7 Yale L. & Pol'y Rev. 1, 8 (1989) ("IRCA was adopted only after almost a decade of intensive, highly visible public debate punctuated by several bills that passed one or both houses by razor-thin margins only to die without final approval.").

As this Court has recognized, IRCA's employment regulations are "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging unauthorized employment with measures to protect those who might be adversely affected." *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991). Accordingly, "the legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process." *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) (citing H.R. Rep. No. 99-682(I) (1986), 1986 USCCAN 5649).

Congress also acted to address serious concerns that employers might, out of fear of sanctions, discriminate against lawfully authorized employees or job applicants who looked or sounded foreign. *See, e.g.*, H.R. Rep. No. 99-682(I) at 68, 1986 USCCAN at 5672 ("Numerous witnesses over the past three Congresses have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members."); *see also Collins*, 948 F.2d at 552, 554; 132 Cong.

Rec. H9708-02 (daily ed. Oct. 9, 1986) (statement of Cong. Berman); *id.* (statement of Cong. Fish); 131 Cong. Rec. S11414-03 (daily ed. Sept. 13, 1985) (statement of Sen. Levin). Congress' careful balancing is reflected in the I-9 process and in IRCA's graduated scale of penalties, complementary anti-discrimination provisions, and extensive adjudicative process. *See supra* at 6-8.

In sum, IRCA created, for the first time, "a *comprehensive scheme* prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (emphasis added). Congress emphasized in §115 of IRCA its paramount concern for uniformity:

> It is the sense of the Congress that – (1) the immigration laws of the United States should be enforced vigorously and *uniformly*, and (2) in the enforcement of such laws, *the Attorney General* shall take due and deliberate actions necessary to safeguard the constitutional rights, personal safety, and human dignity of United States citizens and aliens.

P.L. 99-603 (emphases added).[3]

The Arizona Act is preempted as demonstrated below. First, the Act is expressly preempted by IRCA. Second, and independently, the Act is conflict

---

[3] Inexplicably, the district court found that Congress was *not* interested in uniformity, but rather intended to create a non-uniform system "because Congress recognized the disproportional harm to core state and federal responsibilities from unauthorized alien labor." ER 34:14-15. The court's notion that Congress was animated by this concern is unsupported by citation to the statute or legislative history.

preempted because it mandates participation in the E-Verify program that federal law makes voluntary and because the state sanctions scheme conflicts with the federal employer sanctions system in multiple ways.

### A. IRCA Expressly Preempts The Arizona Act's Employer Sanctions

Congress' comprehensive regulation, its express desire for uniformity, and the careful legislative compromises reflected in IRCA demand an effective application of the statute's broadly worded express preemption provision: "The 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." 8 U.S.C. §1324a(h)(2).

The Arizona Act imposes civil sanctions on employers found by a state court judge to employ an unauthorized alien. The Act, therefore is preempted, unless it fits within the savings clause for "licensing and similar laws." 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. Nothing in the parenthetical savings clause or elsewhere in IRCA purports to give states the broad authority to create their own employer sanctions schemes, complete with separate adjudication and enforcement systems and additional compliance requirements. Congress chose to allow only a narrow range of measures that are both predicated on a *federal* finding under

IRCA's procedures that an employer has hired an unauthorized alien and enacted as part of a licensing law.

### 1. IRCA's Express Preemption Provision Reflects Congress' Enactment Of Comprehensive Regulation Of Unauthorized Employment

Two basic preemption principles require a narrow interpretation of the savings clause in §1324a(h)(2). First, because immigration is an area in which federal interests are both well-established and particularly strong, this case falls into an area where Arizona cannot invoke any presumption against preemption. The Supreme Court has ruled that "an 'assumption' of nonpre-emption is not triggered when the state regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). Second, because the Arizona Act treads on an area of expansive federal regulation, courts "decline to give broad effect to saving clauses." *Id.* at 106 (holding that courts must so decline where broad reading "would upset the careful regulatory scheme established by federal law"); *see also Aetna Health Inc. v. Davila*, 542 U.S. 200, 216-17 (2004); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 870-71 (2000).

Arizona's defense and the basis of the district court's ruling is the fundamentally erroneous view that employment of unauthorized aliens is not central to federal immigration policy. The district court in particular placed dispositive reliance on *De Canas v. Bica*, 424 U.S. 351 (1976). ER 30:7-32:7, 33:18-22. That approach disregards the critical change in immigration law that

IRCA executed. In 1976, when *De Canas* was decided, the Supreme Court could correctly find that the immigration statute expressed only "a peripheral concern with employment of illegal entrants." 424 U.S. at 360. At that time, the INA contained no general employer sanctions scheme. *Id.* at 361 n.9. As the Court explained, immigration law as it then stood demonstrated: "Congress believes that this problem [of unauthorized employment] does not *yet* require uniform national rules and is appropriately addressed by the States as a local matter." *Id.* (emphasis added). On the basis of that assessment, the Court concluded that "absent congressional action," the California employer sanctions law at issue was not an improper "state incursion on federal power." *Id.* at 356.

But the key predicate of *De Canas* was reversed ten years later by the enactment of IRCA in 1986. IRCA fundamentally altered the immigration statute's regulation of employment, filling the federal statutory void on which *De Canas* hinged. IRCA "forcefully ma[kes] combating the employment of illegal aliens central to [t]he policy of immigration law." *Hoffman Plastic*, 535 U.S. at 147 (internal quotation marks omitted). The INA now comprehensively regulates the employment of aliens, and has done so for more than two decades. The district court's reliance on the *De Canas* Court's now-outdated assessments of the state and federal interests in alien employment regulation is therefore entirely misplaced.

The district court's erroneous reliance on *De Canas* infected the court's entire preemption analysis and, in particular, led it to adopt an all-encompassing

"'presumption against preemption.'" ER 33:22-24. This in turn caused the district court's overly broad interpretation of IRCA's parenthetical saving clause in 8 U.S.C. §1324a(h)(2), and correspondingly narrow interpretation of the surrounding express preemption provision. The district court's presumption against preemption is belied by IRCA and unsupported by *De Canas*. *See supra* at 16-18, 20-21.

More important, and independent of the district court's erroneous presumption, a reading of the narrow parenthetical savings clause that allows the Arizona Act is unsustainable. The savings clause cannot be construed to upset Congress' comprehensive regulatory scheme and must be read consistently with the federal government's important, and express, interest in establishing nationally uniform immigration law and policy. *See supra* at 16-18.

### 2. IRCA's Savings Clause Does Not Authorize The Arizona Act

The parenthetical savings clause does not authorize the Arizona Act for two independent reasons. First, whatever limited laws IRCA permits, states must premise their sanctions on a *federal* finding under the procedures set forth in IRCA that employers have violated the federal employer sanctions law, and cannot make their own determinations that employer have illegally hired unauthorized aliens. Second, to fall within the savings clause, state laws must constitute *bona fide* "licensing" or "similar" laws and cannot merely invoke that rubric to impose a sweeping prohibition of general and generic application. Arizona's Act fails both

tests: it creates a separate state adjudication and enforcement system that is not allowed under IRCA, and it is not a "licensing" or "similar" law.

### a. The Savings Clause Does Not Give States Authority To Make Their Own Determinations Regarding Whether An Employee Is Authorized To Work In This Country

Nothing in the language of the parenthetical savings clause authorizes states to create their own adjudication and enforcement systems – in which state officials make determinations about who has, and has not, knowingly employed an unauthorized alien – that are untethered to any federal IRCA finding. Nor could such a reading be reconciled with "the statute as a whole" and "its object and policy" (*Crandon v. United States*, 494 U.S. 152, 158 (1990)), as is required. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) ("[W]e are obliged in interpreting the saving clause to consider . . . the role of the saving clause in [the statute] as a whole.").

Congress sought in IRCA and §1324a(h)(2) to create a uniform, comprehensive, federal regulatory system with detailed procedures for deciding which employers may be sanctioned for hiring unauthorized aliens. *See supra* at 6-8, 16-18. The parenthetical savings clause cannot be read as silently authorizing the creation of divergent state procedures and systems, such as Arizona's, that would inevitably introduce complexity and non-uniformity of results. *Cf. Pilot Life Ins.*, 481 U.S. at 54 ("The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its

choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive."). The savings clause does not empower states to determine whether an employer sanctions violation has occurred independently of the careful IRCA process Congress established for that purpose in 8 U.S.C. §1324a(e).

The Supreme Court's analysis in *Locke* demonstrates why this is so. At issue there was whether a savings clause that permitted states to impose "additional liability or requirements" pertaining to "the discharge of oil or other pollution by oil within [a] state" allowed states to regulate the design and at-sea conduct of ships. 529 U.S. at 97, 104. Before analyzing this savings clause, the Court described the comprehensive federal scheme regulating national and international maritime commerce and conduct of ships. *Id.* at 99-103. Because of this comprehensive federal regulation, the Supreme Court rejected a broad interpretation, finding that it was "quite unlikely that Congress would use *a means so indirect as the saving clauses* in [the statute] to upset the settled division of authority by allowing States to impose additional unique substantive regulation on the at-sea conduct of vessels." *Id.* at 106 (emphasis added); *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("[W]e do not believe Congress intended to undermine this carefully drawn statute through a general saving clause.").

The same analysis applies here. It is implausible that Congress would use a seven-word parenthetical that says nothing about state authority to create

divergent adjudicatory systems to upend IRCA's regulatory scheme. The district court recognized – as it had to – that its approach allowed Arizona to create a separate state adjudicatory process in which state court judges make independent determinations about whether an employer has employed an unauthorized alien. ER 39:4-6. The district court's reading of the savings clause as broadly authorizing state employer sanctions schemes that are disconnected from federal adjudication under IRCA fails to take proper heed not only of the force of the preemption provision itself, but also of congressional intent as expressed in IRCA as a whole.

The district court attempted to distinguish *Locke* based on the length of time the federal government had regulated in the maritime area. ER 17:25-26. But it was the existence of a comprehensive federal scheme, and not how long that scheme had been in effect, that was crucial to *Locke*'s analysis of the savings clause. 529 U.S. at 106 (relying on "*careful regulatory scheme*") (emphasis added); *see also Geier*, 529 U.S. at 870 (applying same principle to modern federal scheme).[4] Here, moreover, IRCA has been a central feature of federal immigration law for more than two decades.

---

[4] Congress has the unquestioned authority to displace state law even in areas historically regulated by the states. For example, when Congress enacted ERISA, it broadly preempted state laws governing employee pension plans even though such plans had been a traditional area of state regulation. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510, 522-23 (1981).

The threat to uniformity and risk of chaos that would result if individual states and municipalities were allowed to upset the comprehensive and uniform federal system that Congress created in IRCA is real. Each state, city, and town could create its own process for determining whether an employer has hired an unauthorized alien. Employers doing business in multiple states, including many represented by Plaintiff United States Chamber of Commerce and other Plaintiff business associations, would have to comply with different schemes for all 50 states and for every city and town throughout the nation. Absent a uniform federal system, an employer alleged to have hired an unauthorized alien could be hauled into multiple forums – at the federal, state, and municipal levels – each with its own court system, procedures, and case law bearing on the meaning and implementation of that forum's scheme.

Balkanization is already underway. Numerous states and municipalities have passed, or are considering, laws sanctioning the employment of unauthorized aliens.[5] Some of these schemes have much in common, but others are very

---

[5] *See, e.g.*, Tenn. Code §50-1-103; La. Rev. Stat. §23:911 *et seq.*; W. Va. Code §21-1B-1 *et seq.*; Mississippi Employment Protection Act of 2008, S.B. 2988, 2008 Reg. Sess. (Miss. 2008) (enacted); S.B. 08-083, 66th Gen. Assem., 2nd Reg. Sess. (Colo. 2008); S.B. 0335, 115th Gen. Assem., 2nd Reg. Sess (Ind. 2008); H.B. 1381, 94th Gen. Assem., 2nd Reg. Sess. (Mo. 2008); S.B. 458, 82nd Legis., 2008 Reg. Sess. (Kan. 2008); H.B. 304, 2008 Reg. Sess. (Ky. 2008); S.B. 979, 191st Gen Assem., 2007 Reg. Sess. (Penn. 2007); A.B. 2421, 2007-08 Reg. Sess. (Cal. 2008); H.B. 1103, 2008 Reg. Sess. (La. 2008); S.B. 1312, 213th Legis., 1st Reg. Sess. (N.J. 2008); H.B. 5718, 95th Gen. Assem. (Ill. 2008); 25 Okla. Stat. §1313; City of Valley Park, Mo. Ordinance 1722 (Feb. 14, 2007); City of

(continued...)

different. For example, the Arizona Act mandates participation in E-Verify, but Illinois' Public Act 095-0138, enacted in 2007 and codified at 820 Ill. Comp. Stat. §55/12, prohibits participation in that program. As these different schemes multiply, it becomes increasingly difficult for an employer doing business in multiple states to navigate the web of conflicting requirements.

Courts have repeatedly interpreted express preemption provisions to invalidate laws that threaten such patchwork regulation. *See, e.g., Rowe v. New Hampshire Motor Trans. Ass'n*, 128 S.Ct. 989, 996 (2008) (state law that would "easily lead to a patchwork of state service-determining laws, rules, and regulations" expressly preempted); *Watters v. Wachovia Bank*, 127 S.Ct. 1559, 1568 (2007) (state mortgage laws expressly preempted when "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking" by "all States in which the banks operate" was "precisely what the [National Bank Act] was designed to prevent").

Given Congress' expressed desire for uniformity, the parenthetical savings clause cannot be read to authorize such a splintered and idiosyncratic approach to regulating alien employment. Congress never intended for employers to be

---

[5](...continued)
Hazleton, Pa. Ordinance Nos. 2006-18 (Sept. 21, 2006) and 2006-40 (Dec. 28, 2006).

The Hazleton ordinances were found preempted in *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007). The Valley Park ordinances were found not preempted. *Gray v. City of Valley Park*, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008). Both decisions are currently on appeal.

subject to the sort of patchwork of state and local immigration laws that the Arizona Act begins to stitch.

### b. The Arizona Act Does Not Constitute A Permissible "Licensing" Provision

Arizona's Act is also expressly preempted for the separate reason that it does not constitute a "licensing" or "similar" law that Congress intended to permit. In ordinary usage, "licensing law" refers to a law about licensing, such as a medical licensing law, that sets forth conditions and qualifications governing the issuance of a particular license to a particular type of business. The Arizona Act, both on its face and in its operation, is not a licensing law specific to a type of business, but a law about immigration and alien workers. The Act's title makes no reference to licensing, and the Act is codified separately from any licensing provisions. Further, the Act encompasses legal instruments that neither the State nor common sense would consider "licenses" in the usual context, such as articles of incorporation. Ariz. Rev. Stat. §23-211(7).[6] Moreover, the Act sets forth a general prohibition on the employment of unauthorized workers – and does so in what the Governor acknowledged is an attempt to stop illegal immigration (ER 287) – not terms that apply to any specific state license. *Cf. Pilot Life Ins.*, 481

---

[6] The district court attempted to avoid this issue by requiring an as-applied challenge. ER 27:1-4. The preemption claims do not implicate the distinction between facial and as-applied challenges because if the Act is preempted, it is preempted as to everyone due to Arizona's lack of power to enact the statute as written; that is, the effect of the Act in a particular context is unimportant. *See, e.g., Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 644 (2d Cir. 2005).

U.S. at 50 ("common-sense understanding" of savings clause does not encompass state-law action at issue). That the Act reaches a broad range of employers regardless of whether they hold a license in the ordinary sense of the word demonstrates that the Act is not a "licensing law" within the meaning of the narrow exception.

The district court nevertheless held that "the Act is a 'licensing law' because it sets out criteria and a process to suspend or revoke a permission to do business in the state," relying on a dictionary definition of "license" as "permission, usually revocable, to commit some act that would otherwise be unlawful." ER 26:18-22. That interpretation focuses narrowly on one aspect of Arizona's Act without recognizing its overall purpose and the various obligations the Act places on employers. And it seeks the broadest meaning of the phrase "licensing law" without regard to common sense limitations on that phrase or the context in which Congress used it. To hold Arizona's Act not preempted under this provision, as did the district court, would undermine Congress' intent by allowing any state or locality to circumvent the preemption provision through the artifice of labeling some part of the law with the word "license." *See Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 355 (4th Cir. 2006) (rejecting "reading of [a] preemption clause [that] would . . . turn an exception to a preemption provision into a loophole so broad that it would virtually swallow the preemption clause itself" because to do so "would undermine Congress' plain intent").

Moreover, although the district court relied on a dictionary definition of "license," the court ignored the same dictionary's definition of "licensing" – the word Congress actually used: "A governmental body's process of *issuing* a license." Black's Law Dictionary 940 (8th ed. 2004) (emphasis added). Hence, under the district court's cited source, the Act fails because it is not even primarily about the *issuance* of licenses.

### 3. IRCA's Amendment Of Other Provisions And Its Legislative History Reinforce That The Arizona Act Is Expressly Preempted

If Congress had intended the savings clause to have the incongruous result that the district court upheld – authorizing states to create divergent schemes in an area in which Congress intended uniformity – Congress would have said so. But Congress did not, either in IRCA's text or in its legislative history. Indeed, IRCA's legislative history and interaction with other statutes confirm that Congress intended IRCA to create a uniform federal system, saving only a narrow category of state licensing laws that does not include the Arizona Act.

In IRCA, Congress was directly concerned with the interaction between the new employer sanctions system and existing licensing laws regulating farm labor contractors ("FLCs"). Accordingly, in the subsection of IRCA immediately following the new employer verification scheme (§101(a)), Congress amended the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"). IRCA, §101(b) (1986), amending 29 U.S.C. §1801 *et seq.* AWPA was (and still is) the federal law regulating the licensing of farm labor contractors. Until IRCA's

enactment in 1986, AWPA contained an affirmative prohibition on employment of unauthorized aliens. P.L. 97-470, 96 Stat. 2583, §106 (1983) (then codified at 29 U.S.C. §1816). By 1986, several states had adopted their own farm labor contractor licensing or registration schemes, some of which prohibited hiring unauthorized workers or specifically required FLCs to comply with federal law, including AWPA's prohibition of such employment.[7] These schemes were permitted because AWPA allowed for "appropriate" state regulation in this area. AWPA, §521 (codified at 29 U.S.C. §1871).

In drafting IRCA, Congress confronted how to integrate the existing federal and state farm labor contractor licensing schemes with the new federal employer sanctions system. Congress took an approach designed to ensure uniformity by requiring a *federal IRCA finding* as the basis for enforcing both AWPA and the state licensing laws AWPA authorized.

On the federal level, Congress replaced AWPA's general prohibition on unauthorized hiring by FLCs with a provision that requires a finding that the FLCs have violated IRCA before the Secretary of Labor may take action against

---

[7] For example, Pennsylvania had a "registration" law requiring FLCs to obtain a state certificate of registration. 43 P.S. §1301.501 *et seq.* (1983). The law specifically prohibited FLCs from knowingly engaging the services of a person violating the federal immigration laws. 43 P.S. §1301.505(3) (1983). The state could refuse to issue, suspend, or revoke a certificate when any provision of the law was violated. 43 P.S. §1301.503(1) (1983). Other states, including California and New Jersey, had "licensing" laws in effect in 1986 that required compliance with federal law. Cal. Lab. Code §1690(6) (1985); N.J.S.A. §34:8A-11 (1988 version unchanged since 1986).

licenses. IRCA, §101(b)(1)(B), (C) (inserting into AWPA the language "has been found to have violated paragraph (1) or (2) of [8 U.S.C. §1324a]"). In other words, Congress constrained the federal power to sanction unauthorized hiring by requiring that it turn on a determination under IRCA. *Accord* IRCA, §115 (charging "the Attorney General" with enforcement).

The legislative history confirms that the savings clause in §1324a(h)(2) was intended to have the same effect with regard to the existing state farm labor contractor laws. As the House Judiciary Committee Report explains, the purpose of IRCA's preemption provision is to bar state and local laws – leaving only a narrow category of regulations whose sanctions are, like farm labor contractor licensing laws, *based on a federal finding of an IRCA violation.*

> The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment, or referral of undocumented aliens.
>
> They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation, or refusal to reissue a license to any person who has been *found to have violated the sanctions provisions in this legislation.* Further, the Committee does not intend to preempt licensing or 'fitness to do business laws,' *such as state farm labor contractor laws or forestry laws*, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. Rep. No. 99-682(I) at 58, 1986 USCCAN at 5662 (emphases added).

The House Report underscores what IRCA itself establishes: Congress intended that for *any* sanction to be imposed, the sanctioning authority must await completion of the federal process, and a federal finding that the employer has violated IRCA. That is the only conclusion that can be drawn from the design of IRCA as a whole, which was so careful to establish a single, uniform procedure for finding a violation that it required even *federal* licensing laws to turn on the IRCA finding. Arizona's Act does no such thing.

The Report also confirms that Congress specifically had in mind laws governing FLCs in creating the parenthetical savings clause, and that such licensing laws could contain affirmative prohibitions on employment of unauthorized aliens, so long as no sanctions were imposed in the absence of a federal finding. The laws at issue were *licensing* laws that established a state scheme to regulate a specific industry; set forth qualifications for doing business in that industry; imposed obligations relevant to that industry; and empowered a state licensing authority to assess an applicant's qualifications, issue and renew licenses, monitor compliance, and impose sanctions for noncompliance. *See supra* note 7. Arizona's Act does not resemble these laws in the slightest.

The district court expressed the view that "Plaintiffs' interpretation would reduce the [savings clause] almost to nothing, in contravention of the plain language of the statute." ER 27:25-27. But that the savings clause does not embrace Arizona's employer sanctions scheme does not rob the clause of meaning. The clause does real work by saving from preemption laws like those governing

farm labor contractors that incorporate a requirement that the licensee not be found to have violated IRCA. Indeed, the district court's very expansive interpretation of the savings clause reduces the express preemption provision "almost to nothing."

### B. The Arizona Act Is Preempted Because It Conflicts With Federal Law

Arizona's Act is also preempted under well-established principles of conflict preemption. Conflict preemption invalidates any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier*, 529 U.S. at 873-74 (internal quotation marks omitted); *see also Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977) (invalidating alien employment regulation).

The Arizona Act "stands as an obstacle" to Congress' goals in multiple ways. The Act requires all Arizona employers to enroll in the E-Verify program even though Congress made it voluntary. Moreover, the Act's employer sanctions regime creates a separate adjudication and enforcement scheme that the district court recognized could generate results in conflict with the federal system; bypasses procedural devices Congress created to protect employers and workers and instead imposes uninvited burdens; creates severe and drastic penalties out of all proportion with IRCA's scheme with no countervailing balancing measures to prevent discrimination; and deprives employers of a defense to liability that Congress provided them.

### 1. Conflict Preemption Is An Independent Basis For Invalidating The Arizona Act

*Geier* and other Supreme Court cases establish two key aspects of preemption jurisprudence: (i) courts undertake conflict preemption analysis to determine whether a state law conflicts with federal law even if a savings clause establishes that the state law is not *expressly* preempted, and (ii) courts employ a broad inquiry to determine whether a state law presents an obstacle to Congress' purposes and objectives.

*Geier* involved a federal regulation that required automobile manufacturers to equip some, but not all, cars with passive restraints. 529 U.S. at 864-65. The plaintiff maintained in a state tort action that her car had been negligently designed because it did not have an airbag. *Id.* at 865. The *Geier* Court first agreed with the plaintiff that the tort claim fell within a savings clause of the governing federal statute, which established that "compliance with a federal safety standard does not exempt any person from any liability under common law." *Id.* at 867-68 (punctuation omitted). Thus, the tort claim was not *expressly* preempted because it fit within the savings clause. *Id.* at 869.

Crucially, that did not end the Court's inquiry. The *Geier* Court went on to consider the broader goals and purposes of the federal statute, reasoning that to rely on the savings clause alone without further considering whether the tort claim conflicted with federal law would "permi[t] [federal] law to defeat its own objectives, or potentially . . . to destroy itself." *Id.* at 872 (punctuation omitted). The Court rejected that result and the dissent's view that the savings clause should

impose a "special burden" on the party claiming preemption. *Id.* at 872-73; *see also Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063, 1069 (9th Cir. 2000) (holding that though state common law action fell within savings clauses to express preemption provision, "the question remains, as in *Geier*, whether such common-law requirements conflict with the statute considered as a whole"); *accord Sprietsma v. Mercury Marine*, 537 U.S. 51, 64-65 (2002).

Accordingly, the *Geier* Court analyzed whether there was an "actua[l] conflict" between the tort claim and the federal safety standard. 529 U.S. at 874. The Court held that even though it was possible to comply with the federal standard without risking liability under the plaintiff's tort theory, the tort claim was preempted because it "would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Id.* at 881. The Court explained that state law is preempted not only where simultaneous compliance is impossible, but also whenever state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress – whether that obstacle goes by the name of conflicting; contrary to; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; interference, or the like." *Id.* at 873 (punctuation omitted).

The *Geier* Court's formulation of the conflict preemption standard drew directly on *Hines*, a seminal 1941 case overturning a state law regulating immigrants, and recognized the long line of Supreme Court cases establishing that state laws that create obstacles to federal purposes are impermissible. *See Geier*,

529 U.S. at 873-74; *see also Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1132 -33 (9th Cir. 2005); *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002). *Geier*'s principle that a federal statute's means, as well as its ends, are relevant to preemption analysis is also well-established: "[i]n determining whether [state] law 'stands as an obstacle' to the full implementation of the [federal Act], it is not enough to say that the ultimate goal of both federal and state law [is identical]. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *Int'l Paper Co.*, 479 U.S. at 494; *see also Ting v. AT&T*, 319 F.3d 1126, 1137 (9th Cir. 2003) ("[O]bstruction preemption focuses on both the objective of the federal law and the method chosen by Congress to effectuate that objective, taking into account the law's text, application, history, and interpretation.").

The district court took an improperly narrow view of what constitutes an "actual conflict." For example, the district court sought to downplay many conflicts as "mere difference[s]" (ER 37:12-13, 83:15-18), even though the Supreme Court specifically recognized in *Geier* that a "difference" that stands as an obstacle to Congress' purposes requires invalidation of a state statute. 529 U.S. at 873. The district court primarily relied on a one-Justice concurrence in *Gade v. Nat'l Solid Wastes Mgt. Ass'n*, 505 U.S. 88 (1992), and other pre-*Geier* preemption cases in support of a narrow view of conflict preemption. ER 37:4-38:5. But the concerns expressed in the concurrence in *Gade*, and relied on by the

court below, are precisely the concerns that the Supreme Court *rejected* in *Geier* when the majority (including the concurring Justice in *Gade*) reiterated that conflict preemption encompasses *any* state law that "stands as an obstacle to the accomplishment and execution of the *full* purposes and objectives of Congress." 529 U.S. at 873 (emphasis added; internal quotation marks omitted). *Compare* ER 37:6-8 (district court citing *Gade* concurrence's criticism of preemption inquiry as "freewheeling") *with Geier*, 529 U.S. at 906 (Stevens, J., dissenting) (citing same criticism) *and id.* at 874 (majority opinion rejecting "freewheeling" criticism).

The district court's improperly narrow view of conflict preemption infects its entire analysis of this topic, and is only made worse by the court's incorrect application of a presumption against preemption. *See supra* at 20-22. As demonstrated below, the conflicts between the Arizona Act and federal law are manifest and require this Court to invalidate the Act.

### 2. The Arizona Act's Mandate Of E-Verify Participation Conflicts With Federal Law

The district court recognized that "mandatory participation in E-Verify is the linchpin on which everything in this statute seems to hang, both in terms of effective deterrence, fair notice, opportunity to avoid sanctions, and under one view of what is necessary" for due process. ER 58:14-18. This "linchpin" cannot withstand preemption scrutiny. Arizona cannot make *mandatory* a program that the district court accurately described as "*voluntary* under federal law." ER 41:18 (emphasis added).

In 1996, Congress established what became E-Verify to test electronic verification of work authorization before considering whether to implement any larger-scale changes in the I-9 process. IRRIRA, §§401, 403(a), 8 U.S.C. §1324a note; ER 633, 650. The program was designed "to determine, on a test basis, whether pilot verification procedures can improve on the existing I-9 system by reducing false claims to U.S. citizenship and document fraud, discrimination, violations of civil liberties and privacy, and employer burden." ER 319; *see also* IIRIRA, §404(d), 8 U.S.C. §1324a note. As befitting an experiment, the program has always been authorized on a temporary basis, and it is currently set to terminate in November 2008. *See* 69 Fed. Reg. 75,997, 75,998 (Dec. 20, 2004).

Congress elected to achieve its goals through *voluntary* employer participation. IIRIRA, §402 (entitled "Voluntary election to participate in a pilot program"); IIRIRA, §402(a) (entitled "Voluntary Election"; providing "any person or other entity that conducts any hiring . . . *may elect* to participate in that pilot program," but official in charge "*may not require* any person or other entity to participate in a pilot program") (emphases added); IIRIRA, §402(e) (setting forth list of "Select Entities Required to Participate" that does not include employers covered by Arizona's Act). 8 U.S.C. §1324a note. Congress has revisited the operation of E-Verify since 1996 and kept participation voluntary. Basic Pilot Extension Act of 2001, Pub. L. No. 107-128, 115 Stat. 2407 (2002); Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat.

1944 (2003).[8] The Act attempts to override Congress' considered decision to keep E-Verify voluntary.

Just as in *Geier*, therefore, Arizona's E-Verify mandate is preempted. The federal regulation in *Geier* aimed to provide manufacturers with a choice of passive automobile restraint systems, seeking to create a mix of devices introduced through a "*gradual* phase-in." 529 U.S. at 874-75, 878-79 (emphasis in original). Not only the variety of devices, but also the timing of the requirement was critical. "[T]he phased-in requirement would allow more time for manufacturers to develop airbags or other, better, safer passive restraint systems." *Id.* at 879. The Court found the state law preempted because it "presented an obstacle" to both the choice of devices and the gradual phase-in that the federal regulation intended. *Id.* at 881.

The same analysis applies here. Congress determined that its goal of developing a reliable, non-burdensome alternative employee-verification system would be achieved through a pilot program based on voluntary employer participation. *Cf. Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154-55 (1982) (state law restricting enforcement of certain mortgage clauses preempted because federal law allowed lenders to include such clauses if they so elected). The Arizona Act, by compelling participation in E-Verify, declares the

---

[8] Congress has also repeatedly declined to enact proposed legislation to make E-Verify or a similar program mandatory, even on a phased-in basis. H.R. 4437, Title VII, 109th Cong. (2005); S. 2611, Title III, 109th Cong. (2006); S. 1348, Title III, 110th Cong. (2007); H.R. 19, 110th Cong. (2007).

federal experiment over. The Act revokes the choice that Congress intended to give employers and second-guesses Congress' judgment that more time is needed before E-Verify is made mandatory. Put another way, the Act "interferes with the methods by which the federal statute was designed to reach its goal." *Int'l Paper Co.*, 479 U.S. at 494.

The district court, however, concluded that because Congress wanted E-Verify used on a voluntary basis, states may require the program's use. ER 42:4-15, 43:23-44:3. The Supreme Court has precluded this result. *See Geier*, 529 U.S. at 874-75 (rejecting view that federal regulation allowing mix of devices including airbags meant "the more airbags, and the sooner, the better"); *Locke*, 529 U.S. at 115 ("When Congress has taken the particular subject-matter in hand . . . a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.") (internal quotation marks omitted). The district court also declared that the statutory provisions evidence only "Congress' intent not to make E-Verify mandatory at the national level" and "[w]ithout more, they do not raise an inference that Congress intended to prevent the states from mandating use of the system in their licensing laws." ER 41:25-42:3. Given the statutory language, it is unclear what "more" Congress could have done to demonstrate that it intended for employers to have a *choice* about E-Verify participation. To be sure, Congress did not *explicitly* state that it wished to "prevent the states from

mandating use of the system." But to require such explicit reference is to eviscerate any form of *implied* conflict preemption.[9]

The reasons that Congress has made the system voluntary apply with full force to the states. According to the September 2007 evaluation of the program commissioned by DHS, "[t]esting on a pilot basis was considered important because of the limitations of Federal data for verification purposes, the potential for workplace discrimination and privacy violations, and practical logistical considerations about larger scale implementation." ER 654. These problems continue to plague E-Verify.

That same recent evaluation observed that, although federal databases used for verification had improved, "further improvements are needed, especially if [E-Verify] becomes a mandated national program . . . . Most importantly, the database used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification, especially for naturalized citizens." ER 639; *see also* ER 644 (addressing high error rate for naturalized citizens "will take considerable time"); ER 646 ("As the program expands . . . , it appears likely . . . downward trends in satisfaction and compliance will continue unless counteracted

---

[9] Stretching to distinguish *Geier*, the district court suggested that unlike the manufacturers there, employers under E-Verify were not vested with "autonomous choice for the sake of a higher federal goal." ER 43:21-22. But that is neither a basis for *Geier* nor for saving Arizona's Act. What matters is that Congress unequivocally expressed its intent that E-Verify be voluntary. The judiciary and state legislatures may not second-guess that direction based on interposing their own goals. *See Int'l Paper Co.*, 479 U.S. at 494-95.

by other program changes."); ER 545-46 (information not up to date in SSA database and program has limited ability to detect identity fraud); ER 304-06, 509, 515 (burdens on employers); *supra* at 8-10.

The Arizona Act also raises additional preemption concerns by using E-Verify in an unanticipated manner that threatens to strain the federal system. *See Garrett v. City of Escondido*, 465 F.Supp.2d 1043, 1057 (S.D. Cal. 2006). Although the district court in this case found solace in the lack of evidence that any "executive officer . . . has balked at the number of E-Verify users that *Arizona* would add to the system" (ER 43:4-5 (emphasis added)), a decision permitting Arizona to upset Congress' plans for E-Verify would mean that all other states could do so as well. *See supra* at 26-27 & n.5. As of August 2007, only about 19,000 employers nationwide had chosen to enroll. ER 469. Arizona now requires 130,000-150,000 additional employers to participate in the system, which alone the state concedes "could strain the system." ER 294. If all states compelled the use of E-Verify, that number would grow to 5.9 million. *See* ER 543. The cumulative effect could destroy the already flawed system. Preemption must be judged by what would be permitted if every state were to follow Arizona's example: A state law conflicts with federal law when the passage of many similar state or local laws would collectively defeat Congress' purposes. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001); *Bonito Boats, Inc. v.*

*Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989); *Credit Suisse*, 400 F.3d at 1136; *cf. Montalvo v. Spirit Airlines*, 508 F.3d 464, 473 (9th Cir. 2007).[10]

### 3. The Arizona Act's Employer Sanctions Scheme Conflicts With The Comprehensive Federal System

The Arizona Act's harsh employers sanctions regime also differs from IRCA and frustrates its central purposes.

1. The comprehensiveness and uniformity of IRCA's federal system inform the conflict preemption analysis of the Act's employer sanctions provisions in much the same way as they inform the express preemption analysis. *See supra* at 16-18, 20-22. IRCA creates a federal adjudicative procedure to determine whether an employer has employed a worker who lacked work authorization from the federal immigration agency. *See* 8 U.S.C. §1324a(e)(2), (3), (7)-(8); *supra* at 7. IRCA's combination of an enforcement scheme with substantive standards "indicates . . . that Congress intended uniform national standards . . . that would

---

[10] The district court stated summarily that the Act would survive even if the E-Verify requirement were invalid, citing the severability clause. ER 36 n.1. But severability clauses are "of no avail where the valid and invalid parts of a statute are inextricably entwined and so connected and interdependent in subject matter, meaning and purpose as to preclude the presumption that the legislature would have passed the one without the other, but, on the contrary, justify the conclusion that the legislature intended them as a whole and would not have enacted a part only." *Hudson v. Kelly*, 263 P.2d 362, 375 (Ariz. 1953). That is precisely the situation here. The Act's sanctions provisions rely on E-Verify usage as employers' primary affirmative defense. Ariz. Rev. Stat. §23-212(I). Hence, the district court recognized that "mandatory participation in E-Verify is the linchpin" of the Act. ER 58:14-18.

foreclose the imposition of different or more stringent state standards." *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 163 (1978). By allowing state courts to make determinations regarding an alien's status that are independent and potentially contradictory of the determinations that Congress entrusted to *federal* authorities, the Act impermissibly requires state courts to intrude on the federal prerogative. *See generally Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 490-91 (1953) ("A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."); *cf. Burr v. INS*, 350 F.2d 87, 90 (9th Cir. 1965) ("The effect of this federal [immigration] statute will not be made to depend upon the niceties and nuances of a state procedure.").

The district court conceded that the Act results in "parallel state and federal adjudication" under which the two systems could come to different conclusions given the same facts. ER 39:4-7. The court nonetheless suggested that the conflict between state and federal determinations would be minimized because "courts must accept [DHS's] determination" of an employee's authorization to work under 8 U.S.C. §1373(c). ER 39:11; *see also* ER 36:6-8 (courts must "rely exclusively on the federal determination . . . under 8 U.S.C. §1373"); Ariz. Rev. Stat. §23-212(H). This conclusion is undermined by the district court's own suggestion, in rejecting Plaintiffs' due process claims, that the Act does *not* require such reliance. ER 46:3-6. That latter interpretation would exacerbate the possibility of inconsistent decisions.

More fundamentally, the Arizona court's reliance on a processless "determination" under §1373(c) does not eliminate the conflict, because it is the IRCA process, *not* §1373(c), that Congress created to determine whether an employer has knowingly employed an unauthorized worker. An inquiry under §1373(c) cannot substitute for the process under 8 U.S.C. §1324a(e) – and indeed is not on its face even about work authorization.[11] Further, federal administrative judges weighing conflicting evidence under IRCA may reach a different conclusion than a state court relying solely on an automated response from a flawed database under §1373(c). *See* ER 605 (explaining weaknesses in §1373(c) determinations). Indeed, because a worker's status can change (ER 388), even a database that is correct at one time may not return information from the proper time period. Also, in some cases, aliens may legally work despite records showing that their work authorization has officially expired. *See, e.g.*, 8 C.F.R. §274a.12(b)(13), (14), (20).

---

[11] Section 1373(c) provides that the federal government "shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the *citizenship or immigration status* of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." 8 U.S.C. §1373(c) (emphasis added). Employment authorization is a different question. For example, numerous categories of non-citizens may be granted employment authorization while their applications for immigration status are pending. *See, e.g.*, 8 C.F.R. §274a.12(c)(8) (asylum and withholding of removal applicants); 8 C.F.R. §274a.12(c)(9) (applicants for adjustment of status to lawful permanent resident); 8 C.F.R. §274a.12(c)(10) (applicants for suspension of deportation or cancellation of removal). Another 19 categories of aliens may be authorized for employment only with a specific employer. 8 C.F.R. §274a.12(b).

2. The Act further undermines IRCA by bypassing the procedural devices Congress created to limit the burden on employers and ensure that the laws are applied fairly and with due regard for individual rights. *See* IRCA, §115 (charging Attorney General with ensuring respect for constitutional rights and human dignity). IRCA restricts investigation of complaints of illegal employment to those "that have a reasonable probability of validity" (8 C.F.R. 274a.9(b); 8 U.S.C. §1324a(e)(1)(B)), and provides employers with extensive process and the option of federal judicial review. 8 U.S.C. §1324a(e)(2)-(3), (7)-(8).

Arizona's Act is far less protective of employers and workers. The Act requires investigation of *every* complaint of illegal employment. Ariz. Rev. Stat. §23-212(B). The Act also restricts employers' right to produce evidence; Arizona courts determine workers' status based *solely* on federal government data produced pursuant to a request under 8 U.S.C. §1373(c). Ariz. Rev. Stat. §23-212(H). Thus, an employer would be barred even from presenting evidence of a federal finding under IRCA that the employer had *not* knowingly employed any unauthorized worker.

These procedural differences violate IRCA.[12] To meet its immigration policy objectives, Congress not only defined prohibited acts, but also decided *how*

---

[12] The Act's sanctions scheme also conflicts with IRCA by impermissibly burdening federal resources. *See Garrett*, 465 F. Supp. 2d at 1057. Inquiries to the federal government, as the district court recognized, will consume federal resources. *See* ER 39:14-17. The district court was mistaken that 8 U.S.C. §1373(c) invites and authorizes such inquiries. *See supra* note 11.

employers should be found to have knowingly employed an unauthorized alien. Arizona cannot make a different decision. *See generally Hines*, 312 U.S. at 66-67; *cf. Preston v. Ferrer*, 128 S.Ct. 978, 985 (2008) (Federal Arbitration Act's requirement that certain contract rules be *uniform* is violated by law that "imposes [*procedural*] prerequisites to enforcement of an arbitration agreement that are not [uniformly] applicable"); *Garner*, 346 U.S. at 490 (noting preemptive force because "Congress did not merely lay down a substantive rule of [labor] law" but "went on to . . . prescribe[] a particular procedure for investigation, complaint and notice, and hearing and decision").

Indeed, IRCA was designed to limit the risk to businesses – not shutter them. *See Collins Foods*, 948 F.2d at 554; H.R. Rep. 99-682(I) at 90, 1986 USCCAN at 5694; *supra* at 17. Yet the Act threatens just that by dramatically increasing investigations and the scope of liability and decreasing the affirmative defenses and procedural protections available to employers during prosecution. Accordingly, the Act upsets the balance struck by Congress and stands as an obstacle to the achievement of IRCA's objectives.

3. The Act's draconian sanctions without any counterbalance also frustrate IRCA's objectives. In sharp – and intentional – conflict with IRCA's graduated scale of civil fines, the Act punishes employers with a "death penalty": loss of the right to do business in the state. *See* ER 291; *supra* at 12; *compare* Ariz. Rev. Stat. §23-212(F) *with* 8 U.S.C. §1324a(e)(4). In addition, after a first violation, an employer must sign a sworn affidavit that it "has terminated the

employment of all unauthorized aliens." Ariz. Rev. Stat. §23-212(F)(1)(c), (F)(2)(d). For a "knowing" violation, failure to produce this affidavit within three days results in suspension of all licenses, as the Act broadly defines that term. *Id.* It is unclear how a large Arizona employer can possibly make the necessary avowals in the short time the Act provides. When she signed the Act, Governor Napolitano acknowledged that "Arizona ha[d] taken the most aggressive action in the country" against employers who hire undocumented workers because Congress had not adequately "cop[ed] with" immigration issues. ER 287.

The Act's harshness is unbalanced by the absence of any measure to temper its one-sided incentive to discriminate. Recognizing the substantial risk that employer sanctions might engender discriminatory hiring and firing practices against *legal* workers, Congress carefully matched IRCA's sanctions provisions with its protections against employment discrimination. *See* H.R. Conf. Rep. No. 99-1000 at 87 (1986), 1986 USCCAN 5840, 5842 ("The antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context."); H.R. Rep. No. 99-682(I) at 67, 1986 USCCAN at 5672 ("[T]he Committee does believe that every effort must be taken to minimize the potentiality of discrimination and that a mechanism to remedy any discrimination that does occur must be a part of this legislation."); H.R. Rep. No. 99-682(II) (1986) at 12, 1986 USCCAN 5757, 5761 ("[I]f there is to be sanctions enforcement and liability there must be an equally strong and readily available remedy if resulting employment discrimination occurs."). IRCA's anti-

discrimination provision expressly reaches beyond federal law's general prohibition on employment discrimination to prohibit, among other things, citizenship status discrimination, and is overseen by a dedicated "Special Counsel." 8 U.S.C. §1324b(a)(1), (2), (c), (d).[13]

The Act does not contain any similar counterbalance, even though its harsher penalties make discrimination even more likely than does IRCA. Confronted with the choice of risking damages in a discrimination action, or risking revocation of their right to do business under the Act, Arizona's employers are considerably more likely to opt for the former than they would be under IRCA. *See generally Lozano*, 496 F. Supp. 2d at 529.[14]

---

[13] IRCA restricts investigation of illegal employment complaints to those "that have a reasonable probability of validity" (8 C.F.R. 274a.9(b); 8 U.S.C. §1324a(e)(1)(B)), and requires the Special Counsel to investigate "each charge [of discrimination] received." 8 U.S.C. §1324b(d)(1). The Act flips these priorities, requiring investigation of *every* complaint of illegal employment (Ariz. Rev. Stat. §23-212(B)), but requiring *no* action on discrimination allegations.

[14] The district court concluded that the Act's lack of an anti-discrimination provision is of no moment because of other state and federal discrimination prohibitions. ER 39:18-40:11. But IRCA's approach shows that stronger employer sanctions must be matched by stronger protections against discrimination. Further, like general federal anti-discrimination law, Arizona's prohibition on employment discrimination does not expressly prohibit discrimination based on citizenship status or apply to employers with fewer than 15 employees. *See* Ariz. Rev. Stat. §§41-1461(4), 1463(B). Governor Napolitano acknowledged that one of the "infirmities" in the Act is that "[t]he bill lacks an antidiscrimination clause to ensure that it is enforced in a fair and non-discriminatory manner." ER 287-88.

Like the other conflicts between Arizona's Act and IRCA, this severe mismatch between the Act and IRCA's combined sanction/anti-discrimination scheme demonstrates the fundamental failing of allowing a multiplicity of state and local legislation. As *Geier* emphasized, states may not reject Congress' decisions about how to balance competing objectives – in this case, hiring restrictions and anti-discrimination protections. *See* 529 U.S. at 873, 877-82. In particular, when Congress has made a "deliberate effort 'to steer a middle path'" (*Crosby*, 530 U.S. at 378), and a state chooses to enact stronger deterrent measures, "the inconsistency of sanctions . . . undermines the congressional calibration of force." *Id.* at 380; *see also American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003) (state may not "use an iron fist where the [federal government] has consistently chosen kid gloves"); *Lozano*, 496 F. Supp. 2d at 527.[15]

4. The Act also irreconcilably conflicts with federal law by increasing the scope of liability in the federal employer sanctions system. In particular, the Act effectively erases an affirmative defense for employers complying in good faith with the I-9 process. 8 U.S.C. §1324a(a)(3). This defense represents Congress' considered judgment that employers who use the I-9 process should be safeguarded. Otherwise, "the system cannot both be effective and avoid

---

[15] The district court attempted to distinguish preemption cases that involve foreign relations. ER 41:7-10. But the federal interest is as dominant in immigration as it is in foreign relations, and for many of the same reasons. *See supra* at 15-16.

discrimination." H.R. Rep. 99-682(I) at 60, 1986 USCCAN at 5664. Recognizing the necessity of incorporating this defense so as not to conflict with federal law, the Act purports to provide a similar affirmative defense. Ariz. Rev. Stat. §23-212(J). But IRCA precludes use of the I-9 documents for this purpose: they "may *not* be used for purposes other than for enforcement of this chapter and sections [of Title 18 of the U.S. Code]" – further evidence that Congress intended a single, *federal* process for determining employer liability. 8 U.S.C. §1324a(b)(5) (emphasis added). Thus, because Arizona employers will be unable to introduce evidence of their I-9 compliance in the state proceedings, such compliance provides no assurance that they will not be sanctioned for employing unauthorized workers, even though Congress sought to provide that assurance in IRCA.

5. The district court did not give proper weight to these conflicts. The court disregarded key conflicts on the basis of its view that the Arizona Act fits within IRCA's parenthetical savings clause. ER 38-39 n.3 (disregarding conflict with I-9 confidentiality provision); ER 40:12-18 (finding Arizona sanctions could not upset congressional balance because Congress "affirmed states' power to impose licensing sanctions"). But *Geier* teaches that even if a state law fits within a clause that saves it from express preemption, that "does *not* bar the ordinary working of conflict pre-emption principles." 529 U.S. at 869 (emphasis in original).

The district court also disregarded conflicts on the ground that the Act's provisions "mirror those of IRCA" such that the sanctioned activity "is exactly the same." ER 41:7, 10-12. That is incorrect as a factual matter, as discussed above. Moreover, "[t]he fact of a common end hardly neutralizes conflicting means . . . and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ. . . . Conflict is imminent when two separate remedies are brought to bear on the same activity." *Crosby*, 530 U.S. at 379-80 (footnotes and punctuation omitted)). Here, Arizona set out to address an immigration problem for which the state believed Congress' solution was inadequate. *See* ER 287. Arizona does not have that authority.

## II. THE ARIZONA ACT VIOLATES DUE PROCESS

The Arizona Act is also constitutionally infirm for failing to afford due process to employers who are alleged to have violated the Act. Under the Due Process Clause of the Fourteenth Amendment, "certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). In considering whether sufficient process has been afforded, courts inquire into (1) "the private interest that will be affected"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)

(internal quotation marks omitted). At a minimum, "[a]n essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Loudermill*, 470 U.S. at 542 (internal quotation marks omitted).

The Arizona Act interferes with significant property and liberty interests of Arizona employers, as they may have their licenses and right to do business suspended or permanently revoked, and that of the employees who may lose their jobs as a consequence. *Id.* at 543 ("We have frequently recognized the severity of depriving a person of the means of livelihood."); *Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts"); *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62-64, 66 n.4 (9th Cir. 1994).

Yet, the Act does not provide employers with the opportunity to be heard "in a meaningful manner" before depriving them of their constitutionally protected interests. *Mathews*, 424 U.S. at 333 (internal quotation marks omitted). Though the Act provides for a pre-sanctions hearing, that hearing does not comport with due process. The Act provides as follows:

> On determining whether an employee is an unauthorized alien, *the court shall consider only the federal government's determination pursuant to 8 United States Code section 1373(c)*. The federal government's determination creates a rebuttable presumption of the employee's lawful status. The court may take judicial notice of the federal government's determination and

> may request the federal government to provide automated or testimonial verification pursuant to 8 United States Code section 1373(c).

Ariz. Rev. Stat. §23-212(H) (emphasis added).

In its preemption discussion, the district court recognized that the first sentence quoted above precludes employers from presenting evidence to Arizona's courts on the issue of an employee's work authorization status: "State enforcement officials and State courts must request and *rely exclusively* on the federal determination of 'immigration status or work authorization status' provided by USCIS under 8 U.S.C. §1373." ER 36:6-8 (emphasis added); *see also* ER 39:10-11.

An inability to contest the §1373(c) determination is fatal. Where "an important factor" in determining whether to deprive an individual of an interest protected by the Due Process Clause exists, "the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing." *Bell v. Burson*, 402 U.S. 535, 541 (1971).

Defendants contend that this problem is solved by the second sentence of §23-212(H), which states that "[t]he federal government's determination creates a rebuttable presumption." *See* ER 45:3-10. But this sentence cannot solve the problem. As the district court implicitly recognized in its preemption analysis, whatever the effect of the "rebuttable presumption," it cannot allow employers to dispute the §1373(c) determination with external evidence of a worker's status. Such a reading would give no effect to the unambiguous first sentence of §23-

212(H). *See, e.g., Mejak v. Granville*, 136 P.3d 874, 876 (Ariz. 2006) (courts "give effect to every provision in the statute"). The "rebuttable presumption" language simply allows the *court* to recheck the federal determination by "request[ing] the federal government to provide . . . verification" of its determination (Ariz. Rev. Stat. §23-212(H)) – that is, to authenticate the document.[16]

The district court opined that even if the §1373(c) determination is conclusive on the state court, "employers still have doubly fair and adequate procedure" in both the E-Verify process and the §1373(c) determination. ER 46:19-21. But neither eliminates the Act's procedural flaws.

The E-Verify system is irrelevant to employers' due process concerns. E-Verify does not allow an *employer* to contest a tentative nonconfirmation of employment authorization.[17] The program allows only *employees* an opportunity to do so. ER 306-07, 542. Employees' opportunity to be heard cannot substitute for that of employers. *See, e.g., Miller v. French*, 530 U.S. 327, 350 (2000) (due

---

[16] The district court suggested that Rule 65.2 of the Arizona Rules of Civil Procedure affords employers the right to a "full evidentiary hearing." ER 45:19-20. But that Rule states that the Arizona Rules of Evidence shall apply "[e]xcept as provided in A.R.S. §23-212(H)." Ariz. R. Civ. P. 65.2(i). Thus, the Act's directive that Arizona courts shall consider "only" the §1373(c) determination precludes the introduction of contrary evidence. Ariz. Rev. Stat. §23-212(H).

[17] Moreover, nothing guarantees that an E-Verify result from when an employee is hired will be the same as a §1373(c) determination before the court months or years later when a sanctions proceeding begins. *See* ER 388 (noting frequency of changes in workers' status).

process "protect[s] the *personal* rights of litigants to a full and fair hearing") (emphasis added); *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) ("[W]here governmental action seriously injures an *individual*, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to *the individual* so that *he* has an opportunity to show that it is untrue.") (emphases added; internal quotation marks omitted).[18]

Nor does the inquiry under 8 U.S.C. §1373(c) itself afford due process to employers. Section 1373(c) prescribes no process at all, is not the basis for finding a violation under IRCA, and does not even purport to provide a means to verify employment authorization status. *See supra* at 46 & n.11. Even if §1373(c) could accommodate inquiries like those required under the Arizona Act, at most federal officials would simply query federal databases without providing an opportunity to contest the response despite the known high error rate in the federal databases. *See* ER 605; *supra* at 9-10. The process is even weaker procedurally than E-Verify. Under no standard of due process could such an uncontested

---

[18] The E-Verify system does not even provide *employees* with constitutionally adequate procedural protections. Employees are given only eight days to contest tentative nonconfirmations; they do so without a judge, formal hearing, or any other formal procedures to guarantee fairness. ER 306-07, 539-43. Further, there is no requirement that the federal government give employees notice of a tentative nonconfirmation; the E-Verify MOU directs *employers* to notify employees. ER 306, 542. *Cf. Taylor v. Westly*, 488 F.3d 1197, 1201 (9th Cir. 2007) (per curiam) (third-party notice likely cannot substitute for notice by the state).

database result be used as a conclusive determination of a critical fact in an enforcement proceeding.

Moreover, even if the Act could be interpreted to permit the Arizona courts to look behind the federal inquiry procedure, there would still not be adequate process. The district court recognized that if Arizona courts had authority to weigh contested evidence to determine whether an employer knowingly hired an unauthorized worker, the result would be potentially inconsistent federal/state determinations of whether employers employed unauthorized aliens. ER 39:4-7. Because of IRCA's comprehensive adjudication scheme, Arizona cannot replace or second-guess a federal government decision by shifting adjudication of work authorization rulings to state judges. *See supra* at 44-46. The federal scheme to determine whether an employer has knowingly hired an unauthorized worker must be exclusive.

## III. PLAINTIFFS HAVE STANDING

Standing requires "injury in fact"; "causation – a fairly traceable connection between the plaintiff[s'] injury and the complained-of conduct of the defendant"; and "redressability." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998); *accord Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 848 (9th Cir.), *amended by* 312 F.3d 416 (9th Cir. 2002).

The district court dismissed *Arizona I*, which was brought only against state officals, for lack of standing. ER 94-118. The district court, however, correctly ruled that Plaintiffs have standing against County Attorneys, who were sued in

*Arizona II.* ER 118:4-5, 18:25-19:7. As the district court found, the cost of using E-Verify is justiciable harm. ER 108:24-114:2; *see also* ER 496, 503, 515, 583-84, 588, 756. The court also concluded that "Plaintiffs' participation in E-Verify is not voluntary and is 'fairly traceable' to the Act." ER 113:8-9.[19] Further, the court determined that the County Attorneys' "power to instigate an enforcement action" is a "true source of Plaintiffs' forced use of E-Verify," and there is a "substantial likelihood that the relief requested will redress [Plaintiffs'] injury." ER 118:4-6 (internal quotation marks omitted); *see also* Ariz. Rev. Stat. §23-212(D); ER 472, 591.

The district court erred, however, in holding that Plaintiffs do not have standing to sue state officials. For the same reasons that the court found Plaintiffs' injuries are "fairly traceable" to the Act, they are traceable to state officials. The district court concluded that state officials were improper defendants due to their lack of prosecutorial authority. ER 114:3-118:7. This is incorrect, as "the core of [plaintiffs'] injuries is not a hypothetical risk of prosecution but rather . . . economic harm." *Nat'l Audubon Soc'y*, 307 F.3d at 855. A link between defendants and prosecution would be necessary only if the injury-in-fact were the threat of prosecution. *See id.* at 855.

---

[19] In addition to the reasons applicable to all Plaintiffs, Valle del Sol and Chicanos Por La Causa will comply with the E-Verify requirement because funders require certification that they comply with state law. ER 490, 502.

The cost of E-Verify is "fairly traceable" to state officials who have duties that are *required* for implementation of the Act. The Director of the Department of Revenue, for example, sent notices commanding compliance with §23-214 and noting benefits that §23-212 attaches to E-Verify use. ER 297-99. The Arizona Legislature made that notice *necessary* under Section 3 of the Act. The notice also reinforced the Act's effect on Plaintiffs and other employers by showing that the State takes the E-Verify mandate and the sanctions scheme seriously. *See Nat'l Audubon Soc'y*, 307 F.3d at 856 (state press release shows compliance is "fairly traceable" to new law).

The Attorney General is also *necessary* for implementation.[20] Section 7 of the Act directs $100,000 to the Attorney General for "enforcing" the Act. Further, the Act *requires* the Attorney General to investigate *every* complaint he receives, and refer *all* non-frivolous ones to County Attorneys for prosecution. Ariz. Rev. Stat. §23-212(B), (C)(3). The Attorney General also supervises and assists County Attorneys in prosecutions as necessary. Ariz. Rev. Stat. §41-193(A). The Attorney General plays a vital and required role in the sanctions scheme.[21]

---

[20] The Court need not address standing as to the remaining state officials given that all of the requested relief can be obtained from the Director of the Department of Revenue and the Attorney General.

[21] Additionally, state officials' actions to coerce employers to use E-Verify will cause Plaintiffs Valle del Sol and Chicanos Por La Causa to be less able to fund their programs and services. ER 494-97, 500-04. Such diversion of resources – resulting in harm to an organization's mission – is justiciable. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *El Rescate Legal Services,* (continued...)

Plaintiffs also satisfy the redressability requirement as to the state officials. Plaintiffs would only enroll in E-Verify because of the Act. *Compare Nat'l Audubon Soc'y*, 307 F.3d at 856 *with* ER 490-91, 502-03, 582-83, 588. Prevailing in this lawsuit would redress Plaintiffs' harm.

## CONCLUSION

For the reasons set forth above, the district court's judgments should be reversed and an injunction should issue.

Dated: April 1, 2008

Respectfully submitted,

By: _____
Jonathan Weissglass

By: _____
Burt M. Rublin

By: _____
Joel W. Nomkin

---

[21](...continued)
*Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1992) (as amended).

DANIEL POCHODA
ACLU Foundation of Arizona
P.O. Box 17148
Phoenix, AZ 85011
Telephone: (602) 650-1854

LUCAS GUTTENTAG
JENNIFER C. CHANG
American Civil Liberties Union Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0770

OMAR C. JADWAT
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2620

STEPHEN P. BERZON
JONATHAN WEISSGLASS
REBECCA SMULLIN
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151

KRISTINA CAMPBELL
CYNTHIA VALENZUELA
Mexican American Legal Defense and Educational Fund
634 S. Spring Street, 11th Floor
Los Angeles, CA 90014
Telephone: (213) 629-2512 Ext. 136

LINTON JOAQUIN
MONICA T. GUIZAR
KAREN C. TUMLIN
National Immigration Law Center
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
Telephone: (213) 639-3900

Attorneys for Plaintiffs/Appellants
Valle del Sol, Inc., Chicanos Por La Causa, Inc., and Somos America

DAVID A. SELDEN
JULIE A. PACE
Ballard Spahr Andrews
& Ingersoll, LLP
3300 North Central Avenue, Suite 1800
Phoenix, AZ 85012
Telephone: (602) 798-5472

BURT M. RUBLIN
DOUGLAS L. FLITTER
Ballard Spahr Andrews
& Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: (215) 665-8500

OF COUNSEL:
ROBIN S. CONRAD
SHANE BRENNAN
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
Telephone: (202) 463-5337

Attorneys for Plaintiffs/Appellants
Arizona Contractors Association, Inc.,
and Chamber of Commerce of the United States of America, *et al.*

PAUL F. ECKSTEIN
JOEL W. NOMKIN
CHARLES A. BLANCHARD
Perkins Coie Brown & Bain P.A.
2901 North Central Avenue
Post Office Box 400
Phoenix, AZ 85001
Telephone: (602) 351-8000

Attorneys for Plaintiff/Appellant Wake Up Arizona! Inc.

## CERTIFICATE OF COMPLIANCE

I certify that this opening brief is proportionately spaced in Times New Roman font, 14 point type, and that this brief contains 15,271 words, exclusive of the corporate disclosure statement, table of contents, table of authorities, certificate of compliance, and proof of service. This certification is based upon the word count of the word processing system used in preparing this brief.

Dated: April 1, 2008 By: _____
Jonathan Weissglass