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.

PETITION FOR REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES, REGULATIONS, AND LEGISLATIVE HISTORY

STATE AND LOCAL STATUTES, ORDINANCES, AND ORDERS

STATEMENT

Plaintiffs/Appellants respectfully petition for rehearing and rehearing en banc. The panel decision upholds the Legal Arizona Workers Act, which (1) *compels* every Arizona employer to enroll in the federal experimental "E-Verify" program that Congress deliberately made *voluntary* and (2) erects a state immigration employment regulation scheme for severely sanctioning employers that imposes different procedures, sanctions, and obligations than the comprehensive federal regulatory scheme that Congress expressly intended to be uniform. At the heart of the panel's erroneous analysis is the assumption that states may alter the careful balance Congress struck in regulating employment of immigrants. The panel decision conflicts with the Supreme Court's preemption precedents and involves a question of exceptional importance because it invites a chaotic result for employers across the country.

First, the panel's decision allowing states to mandate E-Verify in the face of Congress' considered decision to make the program voluntary rested on fundamental analytical mistakes specifically rejected in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000). The panel impermissibly conflated express preemption and the independent doctrine of implied conflict preemption, holding that the latter did not apply because "Congress could have, but did not, *expressly* forbid state laws from requiring E-Verify participation." Slip Op. at 13077 (emphasis added). The Supreme Court, however, has held that conflict preemption does not depend on "an express statement of pre-emptive intent."

Geier, 529 U.S. at 884. Moreover, the panel failed to acknowledge the unequivocal voluntary language of the federal statute: "any person . . . *may elect* to participate in [E-Verify]." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, §402(a), note following 8 U.S.C. §1324a (emphasis added). The panel's assumption that when the federal government says some use is good if voluntary, states may decide that more is better if mandatory was advocated by the dissenters in *Geier* and flatly rejected by the Court. 529 U.S. at 874-75, 881-82. The panel's square conflicts with governing Supreme Court authority alone merit rehearing.

Second, the panel *entirely failed to address* the claim that Arizona's employer sanctions scheme is impliedly conflict preempted because it poses an obstacle to the uniform employer sanctions system Congress enacted in the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359. Even if a state law is not expressly preempted due to a savings clause (as the panel determined), conflict preemption is still applicable. *Geier*, 529 U.S. at 869, 884; *Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063, 1069 (9th Cir. 2000). Under the panel's approach, however, the two inquiries are collapsed in a way that confuses preemption analysis generally and alters the balance Congress struck in IRCA in particular by placing undue burdens on employers. The panel reached such a result in part by refusing to grapple with the fundamental change in the regulation of immigrant employment Congress enacted in IRCA.

Finally, the panel mistakenly relied on the parenthetical savings clause in IRCA's sweeping preemption provision. *See* 8 U.S.C. §1324a(h)(2). Under the panel's view, state "licensing" laws are converted from a narrow category to an all-encompassing power that eviscerates the express preemption provision's restrictions on state regulation of immigrant employment. That result contradicts the logical reading of what constitutes a state business "license," ignores Congress' express desire for uniform enforcement (IRCA, §115), and disregards the Supreme Court's teaching that a savings clause must be reconciled with the statute "as a whole." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987).

Because of the sweeping significance of the panel's ruling, its failure to address critical issues, its misapprehension of governing precedent, and the resulting danger of unprecedented balkanization of rules governing immigrant employment, rehearing and rehearing en banc is warranted.

I. The Panel Overlooked That Arizona's Mandate Conflicts With Congress' Intent To Make E-Verify Voluntary

State law is preempted if *either* a federal statute expressly so provides *or* preemption is implied because of a conflict between state and federal law – even where an express preemption provision does not apply. *E.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). Under implied conflict preemption, a state statute is invalid when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier*, 529 U.S. at 873-74 (punctuation omitted).

The panel decision conflated express preemption (which was not at issue with respect to E-Verify) and implied preemption (which was at issue). The decision's critical passage finds that Arizona's Act is not conflict preempted because "Congress could have, but did not, *expressly* forbid state laws from requiring E-Verify participation." Slip Op. at 13077 (emphasis added). To require such explicit reference is to eviscerate *implied* conflict preemption, which "turns on the identification of 'actual conflict,' and *not on an express statement of pre-emptive intent.*" *Geier*, 529 U.S. at 884 (emphasis added).

There is no question that Congress intended that E-Verify be voluntary. The relevant section of IIRIRA is entitled "*Voluntary* election to participate in a pilot program." IIRIRA, §402 (emphasis added). Congress repeatedly emphasized the voluntary nature of the program. Section 402(a) is entitled "*Voluntary Election*," and provides that employers "*may elect* to participate in that pilot program," but the government "*may not require*" employers to do so. (Emphases added.) Congress also required the government in two separate provisions to publicize or provide information about "the voluntary nature" of the program. IIRIRA, §§402(d)(2), (3)(A). Congress' list of certain "Select Entities Required to Participate" does not include employers covered by Arizona's Act. IIRIRA, §402(e). Moreover, Congress has revisited E-Verify since 1996 when IIRIRA was enacted and repeatedly chosen to keep 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).[1]

Congress intended E-Verify to be voluntary for a reason. The program was established to test electronic verification of work authorization before considering whether to implement larger-scale changes in the existing paper-based system. ER 319, 633, 650, 654. Testing was necessary because of numerous flaws in the electronic system.[2] Appropriately, the program has always been authorized on a temporary basis, and is set to terminate in March 2009. *See* H.R. 2638, 110th Cong. §§106(3), 143 (2008).[3]

Despite this plain directive, Arizona's Act compels participation in E-Verify, thereby declaring the federal experiment over and revoking the choice Congress gave employers. Arizona has second-guessed Congress' judgment that more time is needed before Internet verification can be mandatory, and that the goal of developing a reliable, non-burdensome alternative employee-verification system is best achieved through voluntary participation.

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[1] Congress has repeatedly declined to enact legislation to make the program mandatory, including this year. *E.g.*, 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); H.R. 6789, Title VI, 110th Cong. (2008).

[2] According to a September 2007 evaluation of the program commissioned by the Department of Homeland Security, "further improvements are needed, especially if [E-Verify] becomes a mandated national program." ER 639.

[3] The panel incorrectly stated that E-Verify is an alternative to the paper-based employment verification system. *See* Slip Op. at 13078. E-Verify is merely an addition to that system, not a replacement. IIRIRA, §403(a)(1); ER 304-05.

The panel's result cannot be reconciled with congressional intent unless it is permissible for every state to enact the same mandatory scheme. Under the panel's view of preemption, all 50 states could mandate use of E-Verify, turning the voluntary federal system into a *de facto* compulsory regime. But conflict preemption is triggered when similar state or local laws would collectively defeat Congress' purpose. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001).

Instead of applying settled doctrine, the panel concluded that because Congress encouraged E-Verify use on a *voluntary* basis, states may *require* the program's use. Slip Op. at 13077-78. But the Supreme Court has expressly precluded such a result. The federal regulation in *Geier* provided manufacturers with a choice of passive automobile restraint systems, by introducing a mix of devices through a "*gradual* phase-in." 529 U.S. at 878-79 (emphasis in original). The Supreme Court majority expressly rejected the dissent's view that encouraging use of some airbags meant "the more airbags, and the sooner, the better," and held that when the federal government chooses a gradual phase-in and provides users a choice of methods, a state law that requires a particular method is conflict preempted. *Id.* at 874-75, 881-82; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal."); *Crosby*, 530 U.S. at 379 ("The fact of a common end hardly neutralizes conflicting means.").

II. The Panel Ignored Multiple Conflicts Between Arizona's Employer Sanctions Scheme And IRCA

A. The Panel Failed To Address Conflict Preemption

The doctrine of implied conflict preemption also invalidates Arizona's attempt to enact its own employer sanctions scheme. There are multiple and unavoidable ways in which the Arizona scheme "stands as an obstacle" to IRCA's purposes. *Geier*, 529 U.S. at 873 (punctuation omitted). The panel, however, entirely ignored implied conflict preemption with respect to the employer sanctions provisions – a claim that took up nine pages of the Opening Brief (at 44-53) – and instead addressed only express preemption. Slip Op. at 13072-76.

The panel gave no explanation for its failure to address a major claim, and Supreme Court and Ninth Circuit authority precludes disregarding implied preemption after addressing the separate issue of express preemption. What "must be implied is of no less force than that which is expressed." *Crosby*, 530 U.S. at 373 (punctuation omitted). 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." *Geier*, 529 U.S. at 869 (emphasis in original); *see also Leipart*, 234 F.3d at 1069 (state common law action fell within savings clauses to express preemption provision, but "the question remains, . . . whether such common-law requirements conflict with the statute considered as a whole").

IRCA struck a careful compromise among competing goals. *See 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). Congress aimed to deter illegal immigration. But Congress wanted to minimize the burden on employers. *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991). IRCA also addressed concerns that employers might, out of fear of sanctions, discriminate against lawfully authorized employees or job applicants who looked or sounded foreign. *See id.* at 552, 554; H.R. Rep. No. 99-682(I) at 68-69 (1986), 1986 USCCAN 5649, 5672-73.

By contrast, Arizona's Act furthers one goal – deterring illegal immigration – at the expense of IRCA's other goals. Indeed, that was the point. Arizona's Governor described license revocation as a "business death penalty" (ER 291) and acknowledged that Arizona took "the most aggressive action in the country" because Congress had not adequately "cop[ed] with" immigration issues. ER 287.

There are multiple ways in which Arizona's Act conflicts with IRCA. First, the Act undermines Congress' desire for uniformity in IRCA – as reflected in both the explicit language and the structure of the statute. IRCA states that "immigration laws of the United States should be enforced vigorously and *uniformly*." IRCA, §115 (emphasis added). Congress also carefully created a comprehensive enforcement system that defines prohibited acts (8 U.S.C. §1324a(a)), describes how employers should verify employment (8 U.S.C. §1324a(b)), details an exclusively federal complaint, investigation, hearing, appeals, and enforcement process (8 U.S.C. §1324a(e)(1)-(3), (7)-(9)), and establishes remedies (8 U.S.C. §1324a(e)(4)-(6), (f)). These provisions "indicate[] . . . that Congress intended uniform national standards." *Ray v. Atl. Richfield Co.*,

435 U.S. 151, 163 (1978). In the face of another comprehensive federal enforcement system, the Supreme Court held that the combination of "a substantive rule of law" with "a particular procedure for investigation, complaint and notice, and hearing and decision" indicated that "Congress . . . considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules." *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953). Moreover, Arizona's Act imposes a separate system to determine employment status and an employer's responsibility that will *inevitably* result in different substantive law than federal IRCA law. *See id.* at 490-91. Indeed, the panel concluded that employers may present evidence to state courts "to rebut the presumption created by the federal determination of an employee's unauthorized status." Slip Op. at 13080.[4]

Second, the Act conflicts with Congress' determination about the process for determining whether employers have knowingly employed an unauthorized worker. IRCA's extensive administrative process includes an evidentiary hearing before an administrative law judge with specialized knowledge of federal immigration law and allows for federal judicial review. 8 U.S.C. §1324a(e)(3),

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[4] The panel decision briefly mentions the conflicting substantive determinations that Arizona's Act will produce, suggesting that this awaits a post-enforcement challenge. Slip Op. at 13076. But the Act is preempted not because of a determination that an Arizona court might reach regarding a *particular* worker or employer, but because Arizona has *established* a separate and distinct state adjudicative system. That issue is appropriate for facial challenge. *See, e.g., Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 644 (2d Cir. 2005).

(8). Arizona's scheme instead has hearings before a state court judge. Ariz. Rev. Stat. §§23-212(D), (E), 23-212.01(D), (E).

Arizona's Act also reduces procedural protections for employers. IRCA only allows prosecution before an administrative law judge upon determination of a violation of federal immigration law. 8 C.F.R. §274a.9(b). Arizona requires referral for prosecution if a complaint is not false and frivolous. Ariz. Rev. Stat. §§23-212(C), 23-212.01(C). The Act also eliminates an affirmative defense for employers complying in good faith with the federal I-9 Form "employment verification system." 8 U.S.C. §1324a(a)(3), (b)(1), (6); 8 C.F.R. §274a.2(a)(2), (3). Employers cannot introduce evidence of their compliance in state proceedings because IRCA precludes such use of I-9 documents: they "may *not* be used for purposes other than for enforcement of this chapter and sections [of Title 18 of the U.S. Code]." 8 U.S.C. §1324a(b)(5) (emphasis added).

By reducing employer protections, these procedural differences create an irreconcilable conflict with Congress' aim to limit the risk to businesses. *See Collins*, 948 F.2d at 554; H.R. Rep. 99-682(I) at 90, 1986 USCCAN at 5694. The Supreme Court has found conflict preemption when state law will "increase the burdens facing [regulated parties]" beyond those "contemplated by Congress." *Buckman*, 531 U.S. at 350.

Third, in enacting IRCA, Congress made a "deliberate effort 'to steer a middle path.'" *Crosby*, 530 U.S. at 378 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941)). IRCA's sanctions are measured, with graduated civil fines, and

criminal punishment only for pattern and practice violators. 8 U.S.C. §1324a(e)(4), (f); 8 C.F.R. §274a.10(a), (b)(1)(ii); 73 Fed. Reg. 10,130, 10,133 (Feb. 26, 2008). To temper employers' incentive to discriminate, IRCA also prohibits national origin and citizenship discrimination. 8 U.S.C. §1324b. Arizona has enacted far more severe sanctions against employers, allowing suspension of business licenses for a first violation and revocation for a second, without a countervailing anti-discrimination provision. *See* Ariz. Rev. Stat. §§23-212(F), 23-212.01(F).

The Supreme Court has held that a state cannot enact a sanctions scheme that is dramatically harsher than the carefully drawn federal system. *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"); *Crosby*, 530 U.S. at 380 ("the inconsistency of sanctions . . . undermines the congressional calibration of force"). Nor can the panel's approach be reconciled with this Court's recent recognition that an expansion of the "scope of liability" faced by employers can upset the "delicat[e] balanc[e]" between "preventing unauthorized alien employment" and "avoiding discrimination." *Aramark Facility Servs. v. SEIU Local 1877*, 530 F.3d 817, 825 (9th Cir. 2008) (internal quotation marks omitted).

Critically, when the federal government constructs a careful balance among competing policy objectives, a state law cannot prioritize one objective at the expense of another. In *Geier*, though the state and federal law advanced safety

goals, the Court held the state law preempted because it "stood as an obstacle" to the federal government's considered "'policy judgment'" about how to accommodate multiple objectives. 529 U.S. at 881; *see also id.* at 887-81. That is exactly what Arizona has done by creating a "business death penalty" (ER 291) without counterbalancing discrimination or employer protection provisions.

B. The Panel Overlooked The Federal Nature Of Immigrant Employment

The panel's mistaken preemption analysis and its further error in applying a presumption against preemption (Slip Op. at 13072-74) are based on a failure to grapple with the historic sea change enacted by IRCA, which transformed immigration law into a comprehensive *federal* regulation of immigrant employment. Before IRCA, regulation of immigrant employment was left to the states because Congress had *not* enacted "uniform national rules." *De Canas v. Bica*, 424 U.S. 351, 356, 361 n.9 (1976). But that critical predicate on which *De Canas* turned has not been true since 1986. The uniform national rules that Congress enacted in IRCA definitively moved such regulation to the federal realm, by "forcefully ma[king] 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) (emphasis added; internal quotation marks omitted).[5]

[5] The panel dismissed *Hoffman* as not about preemption. Slip Op. at 13073-74. That is undisputed. But *Hoffman* states a historical fact about how IRCA changed the federal-state employment framework that is distinct from any particular legal context, and which IRCA itself bears out.

In relying on *De Canas* and ignoring IRCA, the panel failed to recognize that Arizona legislated in an area with a more than two-decade "history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). Moreover, this regulation is part of *immigration* law, an area in which preemption concerns are particularly acute. *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *Hines*, 312 U.S. at 66-68.

III. The Panel Created An Exception To IRCA's Express Preemption Clause That Would Destroy Its Central Purpose

The panel's express preemption analysis warrants rehearing because it allows states to frustrate the purpose of IRCA. In doing so, the panel overlooked that a savings clause must be reconciled with the statute "as a whole." *Pilot Life Ins.*, 481 U.S. at 51 (finding express preemption based on detailed and balanced enforcement scheme because federal policy choices would be undermined if states could provide additional remedies).

IRCA expressly preempts "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 panel concluded that Arizona's employer sanctions scheme falls within the parenthetical savings clause for licensing laws because the Act "provides for the suspension of employers' licenses to do business in the state." Slip Op. at 13074. This ignores what Congress tried to accomplish and undermines the congressional policy of uniformity.

Arizona's Act indiscriminately defines "license" to include "*any* agency permit . . . or similar form of authorization that is required by law and that is issued by *any* agency for the purposes of operating a business in this state." Ariz. Rev. Stat. §23-211(9) (emphases added).

The Act makes no distinction between licenses that ensure operators and facilities are properly qualified and can appropriately protect the public (*e.g.*, Ariz. Rev. Stat. §32-2371 (driver training school licenses); Ariz. Rev. Stat. §36-421, *et seq.*, Ariz. Admin. Code R9-10-101, *et seq.* (health care institution licenses)) and "licenses" that require only ministerial acts for the purpose of registration. As a result, the Act regulates *all* corporations and registered partnerships (Ariz. Rev. Stat. §23-211(9)), though their "licenses" simply require properly completed *documentation*, not any particular *qualification*. *See, e.g.*, Ariz. Rev. Stat. §10-202 (articles of incorporation); Ariz. Rev. Stat. §29-308 (certificate of limited partnership). The Act also applies, for example, to virtually any retailer, which must apply for a "license" to comply with state and city sales tax (or "transaction privilege tax") requirements. Ariz. Rev. Stat. §§42-5005, 42-5010, 42-5061; Phoenix City Code §§14-300, 14-460, *available at* http://www.municode.com/resources/gateway.asp?pid=13485&sid=3.

Arizona's broad definition of a licensing law cannot be reconciled with IRCA for two reasons.

First, the point of IRCA's broad preemption provision is that states generally should *not* sanction the hiring of unauthorized aliens. Congress referred

specifically to "licensing and similar laws" in the limited sense such laws are ordinarily understood. The savings clause for "licensing" does not encompass broad schemes of general applicability regarding mere *documentation* requirements, such as articles of incorporation. To permit the parenthetical exception for licensing laws to extend to *any* sanction against *any* business for which *any* locality may require *any* ministerial permission would swallow the rule. States could then circumvent IRCA's express limitation simply by requiring businesses to register a name or tax identification number and calling such documentation a "license." The Supreme Court has forbidden such an illogical result. *See Locke*, 529 U.S. at 106 ("We decline to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law."); *Int'l Paper*, 479 U.S. at 494 ("[W]e do not believe Congress intended to undermine this carefully drawn statute through a general saving clause.").

Second, IRCA demonstrates a manifest intent for uniformity. IRCA, §115. To implement this intent, Congress created a system of solely *federal* investigation, adjudication, and sanction, but allowed states to add licensing penalties after a federal finding of an IRCA violation. The legislative history confirms that states or localities may only sanction "any person who has been found to have violated the sanctions provisions *in this legislation*." H.R. Rep. No. 99-682(I) at 58, 1986 USCCAN at 5662 (emphasis added). The panel claimed that this intent is contradicted by another sentence in the legislative history regarding

the types of activity that are not preempted (Slip Op. at 13075-76), but that sentence says nothing about which jurisdiction makes the finding of a violation.

If every state and locality could regulate employment of aliens as broadly as Arizona has done, the uniformity Congress intended would be destroyed by a chaotic assortment of state and local regulations, each with its own procedures, substantive standards, and enforcement priorities. Employers doing business in multiple states, including many represented by Plaintiff business associations, would have to comply with different schemes for all 50 states and every locality throughout the nation. Balkanization is already underway. More than a dozen states and municipalities have passed laws regulating the employment of aliens.[6]

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[6] *See, e.g.*, Colo. Rev. Stat. §§8-2-122, 8-17.5-102, 24-46-105.3; Exec. Order No. 2006-40 (Idaho Dec. 13, 2006); La. Rev. Stat. §23:991 *et seq.*; Exec. Order No. 08-01 (Minn. Jan. 7, 2008); S.B. 2988, 2008 Reg. Sess. (Miss. Mar. 17, 2008); H.B. 1549, 94th Gen. Assembly, 2nd Reg. Sess. (Mo. July 7, 2008); Okla. H.B. 1804, 51st Leg., 1st Sess. (Okla. May 8, 2007); H.B. 4400, 117th Session (S.C. June 4, 2008); Tenn. Code §50-1-103; S.B. 81, 2008 Gen. Sess. (Utah Mar. 13, 2008); S.B. 782 (Va. Mar. 27, 2008); W.Va. Code §21-1B-1 *et seq.*; City of Valley Park, Mo. Ordinance 1722 (Feb. 14, 2007); City of Hazleton, Pa. Ordinance Nos. 2006-18 (Sept. 21, 2006) and 2006-40 (Dec. 28, 2006). Other proposals are pending.

The Hazleton ordinances were found preempted in *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), and the Oklahoma statute was found substantially likely to be preempted in relevant part in *Chamber of Commerce of the U.S. v. Henry*, 2008 WL 2329164, at *6-7 (W.D. Okla. June 4, 2008). The Valley Park ordinance was found not preempted. *Gray v. City of Valley Park*, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008). These decisions are currently on appeal.

As these different schemes multiply, it becomes increasingly difficult for employers to navigate the web of conflicting requirements.

In permitting this result, the panel neglected to consider Supreme Court cases holding that express preemption provisions 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).

In accord with IRCA's purposes – to enact a *uniform* scheme with only a *narrow* exception for state law – a licensing law is one that protects the public interest by imposing education, experience, or other qualifications for a particular type of business. Such a law may impose sanctions after a federal finding of an IRCA violation.

CONCLUSION

For the foregoing reasons, this case should be reheard.

Dated: October 1, 2008

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CERTIFICATE OF COMPLIANCE

I certify that this petition for rehearing and rehearing en banc is proportionately spaced in Times New Roman font, 14 point type, and that this brief contains 4,193 words, exclusive of the 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: October 1, 2008 By: _____
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PROOF SERVICE

At the time of service I was over 18 years of age and not a party to this action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On October 1, 2008, I served the following document(s):

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Sally Mendez

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,
Plaintiffs-Appellants,

and

ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; WAKE UP ARIZONA! INC.; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION; ARIZONA CONTRACTORS ASSOCIATION,
Plaintiffs,

v.

JANET NAPOLITANO; TERRY GODDARD; GALE GARRIOTT,
Defendants-Appellees.

No. 07-17272
D.C. No.
CV-07-01355-NVW

CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,
Plaintiffs,

and

ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; WAKE UP ARIZONA! INC.; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION; ARIZONA CONTRACTORS ASSOCIATION,
Plaintiffs-Appellants,

v.

JANET NAPOLITANO; TERRY GODDARD; GALE GARRIOTT,
Defendants-Appellees.

No. 07-17274
D.C. No.
CV-07-01355-NVW

ARIZONA CONTRACTORS ASSOCIATION, INC.; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE INC.; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION,

Plaintiffs-Appellants,

and

WAKE UP ARIZONA! INC.; VALLE DEL SOL INC.; CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,

Plaintiffs,

v.

CRISS CANDELARIA; ED RHEINHEIMER; TERRENCE HANER; DAISY FLORES; KENNY ANGLE; DEREK D. RAPIER; MARTIN BRANNAN; ANDREW P. THOMAS; MATTHEW J. SMITH; JAMES CURRIER; BARBARA LAWALL JAMES P. WALSH; GEORGE SILVA; SHEILA POLK; JON SMITH; TERRY GODDARD; FIDELIS V. GARCIA; GALE GARRIOTT; MELVIN R. BOWERS Jr.,

Defendants-Appellees.

No. 08-15357

D.C. Nos.
CV-07-02496-NVW
CV-07-02518-NVW

ARIZONA CONTRACTORS ASSOCIATION, INC.; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE INC.; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION,

Plaintiffs,

and,

WAKE UP ARIZONA! INC.; VALLE DEL SOL INC.; CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,

Plaintiffs-Appellants,

v.

CRISS CANDELARIA; ED RHEINHEIMER; TERRENCE HANER; DAISY FLORES; KENNY ANGLE; DEREK D. RAPIER; MARTIN BRANNAN; ANDREW P. THOMAS; MATTHEW J. SMITH; JAMES CURRIER; BARBARA LAWALL JAMES P. WALSH; GEORGE SILVA; SHEILA POLK; JON SMITH; TERRY GODDARD; FIDELIS V. GARCIA; GALE GARRIOTT; MELVIN R. BOWERS Jr.,

Defendants-Appellees.

No. 08-15359

D.C. Nos.
CV-07-02496-NVW
CV-07-02518-NVW

ARIZONA CONTRACTORS ASSOCIATION, INC.; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM INC.; CHAMBER OF COMMERCE OF THE UNITED STATES; ARIZONA CHAMBER OF COMMERCE; ARIZONA HISPANIC CHAMBER OF COMMERCE INC.; ARIZONA FARM BUREAU FEDERATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA; ARIZONA ROOFING CONTRACTORS ASSOCIATION; NATIONAL ROOFING CONTRACTORS ASSOCIATION; ARIZONA LANDSCAPE CONTRACTORS' ASSOCIATION,

Plaintiffs,

VALLE DEL SOL INC.; CHICANOS POR LA CAUSA, INC.; SOMOS AMERICA,

Plaintiffs,

and

WAKE UP ARIZONA! INC.,

Plaintiff-Appellant,

v.

CRISS CANDELARIA; ED RHEINHEIMER; TERRENCE HANER; DAISY FLORES; KENNY ANGLE; DEREK D. RAPIER; MARTIN BRANNAN; ANDREW P. THOMAS; MATTHEW J. SMITH; JAMES CURRIER; BARBARA LAWALL JAMES P. WALSH; GEORGE SILVA; SHEILA POLK; JON SMITH; TERRY GODDARD; FIDELIS V. GARCIA; GALE GARRIOTT; MELVIN R. BOWERS Jr.,
Defendant-Appellant.

No. 08-15360
D.C. Nos.
CV-07-02496-NVW
CV-07-02518-NVW
OPINION

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted
June 12, 2008—San Francisco, California

Filed September 17, 2008

Before: Mary M. Schroeder, John M. Walker, Jr.,* and N. Randy Smith, Circuit Judges.

Opinion by Judge Schroeder

*The Honorable John M. Walker, Jr., Senior United States Circuit Judge for the Second Circuit, sitting by designation.

COUNSEL

Jonathan Weissglass, San Francisco, California, attorney for plaintiffs/appellants.

Mary O'Grady, Phoenix, Arizona, for the State defendants/appellees.

Buckley King, Phoenix, Arizona, for defendant/appellees, Apache, Cochise, Gila, Graham, Greenlee, La Paz, Navajo, Santa Cruz, and Yavapai Counties.

Daniel Jurkowitz, Tucson, Arizona, for defendant/appellee, Pima County.

OPINION

SCHROEDER, Circuit Judge:

This case is a facial challenge to an Arizona state law, enacted in 2007 and aimed at illegal immigration, that reflects rising frustration with the United States Congress's failure to enact comprehensive immigration reform. The Arizona law, called the Legal Arizona Workers Act, targets employers who hire illegal aliens, and its principal sanction is the revocation of state licenses to do business in Arizona. It has yet to be enforced against any employer.

Various business and civil-rights organizations (collectively, "plaintiffs") brought these actions against the fifteen county attorneys of the state of Arizona, the Governor of Arizona, the Arizona Attorney General, the Arizona Registrar of Contractors, and the Director of the Department of Revenue of Arizona (collectively, "defendants"). Plaintiffs allege that the Legal Arizona Workers Act ("the Act"), Ariz. Rev. Stat. §§ 23-211 to 23-216, is expressly and impliedly preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§ 1324a-1324b, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), codified in various sections of 8 U.S.C. and 18 U.S.C. They also

allege that the Act violates employers' rights to due process by denying them an opportunity to challenge the federal determination of the work-authorization status of their employees before sanctions are imposed.

The district court held that the law was not preempted. The main argument on appeal is that the law is expressly preempted by the federal immigration law provision preempting state regulation "other than through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). The district court correctly determined that the Act was a "licensing" law within the meaning of the federal provision and therefore was not expressly preempted.

There is also a secondary, implied preemption issue that principally relates to the provision requiring employers to use the electronic verification system now being refined by the federal government as a tool to check the work-authorization status of employees through federal records. It is known as E-Verify. Under current federal immigration law, use of the system is voluntary, and the Arizona law makes it mandatory. We hold that such a requirement to use the federal verification tool, for which there is no substitute under development in either the state, federal, or private sectors, is not expressly or impliedly preempted by federal policy.

Plaintiffs also contend that the statute does not guarantee employers an opportunity to be heard before their business licenses may be revoked. The statute can and should be reasonably interpreted to allow employers, before any license can be adversely affected, to present evidence to rebut the presumption that an employee is unauthorized.

We uphold the statute in all respects against this facial challenge, but we must observe that it is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the

Act as applied in any particular instance or manner will not be controlled by our decision. *See Crawford v. Marion County Election Bd.*, ___ U.S. ___, 128 S. Ct. 1610, 1621 (2008) (describing heavy burden of persuasion to sustain a broad attack on the facial validity of a statute in all its applications).

Background

Sanctions for hiring unauthorized aliens were first created at the federal level when Congress passed IRCA in 1986. *See* Pub. L. No. 99-603, 100 Stat. 3359 (1986). IRCA prohibits knowingly or intentionally hiring or continuing to employ an unauthorized alien, 8 U.S.C. § 1324a(a), which it defines as an alien either not lawfully admitted for permanent residence or not authorized to be employed by IRCA or the U.S. Attorney General, 8 U.S.C. § 1324a(h)(3).

IRCA also sets out the method of demonstrating an employer's compliance with the law through a paper-based method of verifying an employee's eligibility, known as the I-9 system. *Id.* § 1324a(b). It requires employees to attest to their eligibility to work and to present one of the specified identity documents. *Id.* § 1324a(b)(1), (2). IRCA then requires employers to examine the identity document the employee presents and attest that it appears to be genuine. *Id.* § 1324a(b)(1)(A). The employer is entitled to a defense to sanctions if the employer shows good-faith compliance with the I-9 system, unless the employer has engaged in a pattern or practice of violations. *Id.* § 1324a(b)(6).

The Attorney General is charged with enforcing violations of IRCA. *Id.* § 1324a(e). Hearings are held before selected administrative law judges ("ALJs"), and the ALJs' decisions are reviewable by the federal courts. *Id.* § 1324a(e)(3).

IRCA contains an express preemption provision, which states: "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." *Id.* § 1324a(h)(2). The scope of the savings clause, which permits state "licensing and similar laws," is a critical issue in this appeal.

IIRIRA directed the Attorney General to establish three pilot programs to ensure efficient and accurate verification of any new employee's eligibility for employment. Pub. L. No. 104-208, §§ 401-405, 110 Stat. 3009, 3009-655 to 3009-666. One of these programs, the Basic Pilot Program, was to be made available in at least five of the seven states with the highest estimated populations of aliens not lawfully present in the United States. *Id.* § 401(c), 110 Stat. at 3009-656. Congress amended IIRIRA in 2002 by extending the four-year period for the pilot programs to a six-year period, *see* Basic Pilot Extension Act of 2001, Pub. L. No. 107-128, § 2, 115 Stat. 2407, 2407 (2002), and again in 2003 by extending the six-year period to an eleven-year period, *see* Basic Pilot Program Extension and Expansion Act of 2003 ("Expansion Act"), Pub. L. No. 108-156, § 2, 117 Stat. 1944, 1944 (2003). The Basic Pilot Program has thus been extended until November 2008. The Expansion Act also expanded the availability of the Basic Pilot Program to all fifty states. *See id.* § 3.

The Basic Pilot Program, now known as E-Verify, is an internet-based system that allows an employer to verify an employee's work-authorization status. It is an alternative to the I-9 system. After an employer submits a verification request for an employee, E-Verify either issues a confirmation or a tentative nonconfirmation of work-authorization status. If a tentative nonconfirmation is issued, the employer must notify the employee, who has eight days to challenge the finding. The employer cannot take any adverse action against the employee during that time. If an employee does challenge the tentative nonconfirmation, the employer will be informed of the employee's final work-authorization status. Any employee

who either does not challenge a tentative nonconfirmation or is unsuccessful in challenging a tentative nonconfirmation must be terminated, or the employer must notify the Department of Homeland Security ("DHS") that it will continue to employ that person. An employer who fails to notify DHS of the continued employment of a person who received a final nonconfirmation is subject to a civil money penalty. An employer who continues to employ a person after receiving a final nonconfirmation is subject to a rebuttable presumption that it knowingly employed an unauthorized alien.

Against this federal backdrop, we turn to the state law at issue here. Arizona enacted the Legal Arizona Workers Act on July 2, 2007, with an effective date of January 1, 2008. 2007 Ariz. Sess. Laws Ch. 279. The Act allows the superior courts of Arizona to suspend or revoke the business licenses of employers who knowingly or intentionally hire unauthorized aliens. Ariz. Rev. Stat. § 23-212. Any person may submit a complaint to the Arizona Attorney General or a county attorney. *Id.* § 23-212(B). After determining a complaint is not false or frivolous, the appropriate county attorney is charged with bringing an action against the employer in superior court. *Id.* § 23-212(C), (D). The Act uses IRCA's definition of "unauthorized alien." *See id.* § 23-211(11). Additionally, the Act requires that the court use the federal government's determination of the employee's lawful status. *Id.* § 23-212(H).

The Act makes participation in E-Verify mandatory for all employers, although it provides no penalty for violation of the requirement. *See id.* § 23-214(A). The Act also includes an affirmative defense for good-faith compliance, explicitly incorporating IRCA. *See id.* § 23-212(J).

The Act mandates a graduated series of sanctions for violations. A first violation requires the employer to terminate the employment of all unauthorized aliens, file quarterly reports of all new hires for a probationary period, and file an affidavit

stating that it terminated all unauthorized aliens and will not intentionally or knowingly hire any others. *Id.* §§ 23-212(F)-212.01(F). A second violation during the probationary period results in the permanent revocation of the employer's business license. *Id.* §§ 23-212(F)(2), (3), 23-212.01(F)(2), (3).

Plaintiffs originally filed an action challenging the Act on July 13, 2007, less than one month after the Act's enactment. The district court dismissed the first action for lack of subject matter jurisdiction because it did not name as defendants any of Arizona's county attorneys, who have the responsibility of enforcing the Act.

In December 2007, plaintiffs filed a second complaint, this time including the Arizona county attorneys as defendants. The principal contentions were that the Act was expressly preempted by federal law because the Act was not a "licensing" or "similar" law within the meaning of the savings clause of IRCA's preemption provision; that, even if the Act was not expressly preempted, it was impliedly preempted because its sanctions provisions and E-Verify requirement conflict with federal law; and that the Act violated employers' due process rights because it did not allow them an adequate opportunity to dispute the federal government's response that an employee was not authorized to work.

The matter proceeded to hearing, and the district court dismissed the Arizona Attorney General for lack of subject matter jurisdiction, because he lacks the authority to bring enforcement actions. The court ruled in favor of the remaining defendants on the merits. It held that the Act is not expressly preempted by IRCA because the Act is a licensing law within the meaning of the savings clause. It held that neither the Act's sanctions provisions, nor the provision mandating use of E-Verify, was inconsistent with federal policy, and thus they were not impliedly preempted. Finally, the court held that the Act did not, on its face, violate due process because

employers' due process rights were adequately protected. Plaintiffs now appeal.

Discussion

I. Preemption

Federal preemption can be either express or implied. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982). When a federal statute contains an explicit preemption provision, we are to " 'identify the domain expressly pre-empted' by that language." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992)). IRCA contains an express preemption clause in its provision creating sanctions for hiring unauthorized aliens. It preempts all state sanctions "other than through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). Plaintiffs contend that the Act is expressly pre-empted.

Implied preemption has two subcategories. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). The first is field preemption, where "the depth and breadth of a congressional scheme . . . occupies the legislative field." *Id.* (citing *Fid. Fed. Sav.*, 458 U.S. at 153). The second is conflict preemption, which occurs when either " 'compliance with both federal and state regulations is a physical impossibility,' " *Fid. Fed. Sav.*, 458 U.S. at 152 (quoting *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. 132, 142-43 (1963)), or where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id.* (internal quotation marks omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). For conflict preemption to apply, the conflict must be an actual conflict, not merely a hypothetical or potential conflict. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 89 (1990). Plaintiffs contend that even if the entire Act is not expressly preempted, the mandatory require-

ment to use E-Verify is impliedly preempted because it conflicts with the voluntary program in IIRIRA.

A. The Act is not expressly preempted because it falls within IRCA's savings clause.

[1] The explicit preemption provision in IRCA states: "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 parties agree that the Act is expressly preempted by IRCA unless it falls within the savings clause of IRCA's express preemption provision. Plaintiffs argue that the Act does not fall within the savings clause because they contend the Act is not a "licensing law" within the ordinary meaning of the phrase, and that the savings clause was not intended to permit a state to create an adjudication and enforcement system independent of federal enforcement of IRCA violations.

The district court held that the plain language of section 1324a(h)(2) does not facially preempt the Act because it does no more than impose conditions on state licenses to do business and thus falls within the savings clause. *Ariz. Contractors Ass'n v. Candelaria*, 534 F. Supp. 2d 1036, 1046-47 (D. Ariz. 2008). The court rejected plaintiffs' argument that section 1324a(h)(2) permits only licensing sanctions that are preceded by a federal adjudication of employer liability, reasoning that neither the plain language of section 1324a(h)(2) nor the legislative history supports plaintiffs' position. *Id.* at 1046-48.

[2] The district court also rejected plaintiffs' argument that the savings clause should be interpreted narrowly, holding that because regulation in the employment field is traditionally an area of state concern, there is a presumption against preemption. *Id.* at 1050-52. An issue central to our preemp-

tion analysis is thus whether the subject matter of the state law is in an area of traditionally state or federal presence. When Congress legislates "in a field which the States have traditionally occupied . . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *United States v. Locke*, 529 U.S. 89, 108 (2000) (internal quotation marks omitted) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Conversely, we do not assume non-preemption "when the State regulates in an area where there has been a history of significant federal presence." *Id.*

[3] A leading case involving the employment of illegal aliens is *De Canas v. Bica*, 424 U.S. 351 (1976). The Supreme Court there upheld a state law prohibiting the employment of unauthorized aliens against a preemption challenge because it concluded that the authority to regulate the employment of unauthorized workers is "within the mainstream" of the state's police powers. *Id.* at 356, 365. The Court reasoned that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355.

[4] Plaintiffs argue that reliance on *De Canas* is now misplaced because IRCA, passed after *De Canas*, brought the regulation of unauthorized employees within the scope of federal immigration law. They rely on language in a later case where the Court said that IRCA made the employment of unauthorized workers "central to '[t]he policy of immigration law.' " *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 & n.8 (1991)) (alteration in original). That case, however, did not involve preemption, or indeed any state regulation. It considered whether the National Labor Relations Board ("NLRB") could award back-

pay to an unauthorized worker, and the Court held it could not. The Court said that the NLRB had impermissibly "trench[ed] upon federal statutes and policies unrelated to the [National Labor Relations Act]" by awarding backpay to an unauthorized alien worker who was improperly terminated from his employment for participating in union-related activities. *Id.* at 140, 141, 144. Because it did not concern state law or the issue of preemption, *Hoffman* did not affect the continuing vitality of *De Canas*. We conclude that, because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of non-preemption applies here.

Plaintiffs contend that the term "license" was intended to encompass only licenses to engage in specific professions, such as medicine or law, and not licenses to conduct business. There is no support for such an interpretation. "Licensing" generally refers to "[a] governmental body's process of issuing a license," *Black's Law Dictionary* 940 (8th ed. 2004), and a "license" is "a permission, usually revocable, to commit some act that would otherwise be unlawful," *id.* at 938. The Act provides for the suspension of employers' licenses to do business in the state. *See* Ariz. Rev. Stat. § 23-212(F). Such licenses are defined as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state." *Id.* § 23-211(9)(a). The statute's broad definition of "license" is in line with the terms traditionally used and falls within the savings clause. The language of the savings clause therefore exempts such state licensing regulation from express preemption. A recent district court case that considered the same issue reached the same conclusion. *See Gray v. City of Valley Park*, No. 4:07CV00881 ERW, 2008 WL 294294, at *8, 10, 12 (E.D. Mo. Jan. 31, 2008) (holding that city ordinance governing issuance and denial of business permits fell within meaning of savings clause). *But see Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 519-21 (M.D. Pa. 2007) (concluding that

state law prohibiting employment of illegal aliens was expressly preempted by IRCA).

Plaintiffs nevertheless contend that the legislative history demonstrates that Congress intended the savings clause to permit states to impose a state sanction only after there had been a federal determination of an alien's unauthorized status. Plaintiffs rely on the second sentence in a paragraph from Part I of House Report 99-682, which as a whole states:

> 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) *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. As the district court found, however, this paragraph as a whole does not support plaintiffs' argument. The paragraph describes the federal law as preempting "civil fines and/or criminal sanctions," neither of which the Act imposes. The paragraph does not suggest that the federal law would preempt local laws that suspend or revoke licenses on the basis of IRCA violations, or state licensing laws that require employers not to hire unauthorized workers. As the district court concluded, plaintiffs' reading of the second sentence, as permitting enforcement only of state licensing regulations conditioned on federally adjudicated

violations, is contradicted by the third sentence, which recognizes states can condition an employer's "fitness to do business" on hiring documented workers. That is what the Arizona Act does.

[5] In sum, the Act does not attempt to define who is eligible or ineligible to work under our immigration laws. It is premised on enforcement of federal standards as embodied in federal immigration law. The district court therefore correctly held that the Act is a "licensing" measure that falls within the savings clause of IRCA's preemption provision.

Plaintiffs finally contend that this kind of state regulation must be preempted because there is a potential for conflict in the practical operation of the state and federal law. They point to a hypothetical situation in which an employer may be subject to conflicting rulings from state and federal tribunals on the basis of the same hiring situation. Whether principles of comity or issue preclusion would allow such a result are questions not addressed by the parties. In any event, a speculative, hypothetical possibility does not provide an adequate basis to sustain a facial challenge. *See Crawford*, 128 S. Ct. at 1621.

B. The Act's provision mandating the use of E-Verify is not impliedly preempted by federal law.

Plaintiffs argue that the Arizona provision mandating the use of E-Verify is impliedly preempted because it conflicts with Congressional intent to keep the use voluntary. They contend that Congress wanted to develop a reliable and non-burdensome system of work-authorization verification, and that mandatory use of E-Verify impedes that purpose. They rely on the Supreme Court's decision in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). *Geier* recognized that state laws that fall within a savings clause and are therefore not expressly preempted are still subject to the "ordinary working of conflict pre-emption principles." *Id.* at 869. A state law is preempted through conflict preemption when it " 'stands as an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* at 873 (quoting *Hines*, 312 U.S. at 67). *Geier* involved a Department of Transportation regulation that was designed to encourage competition among automobile manufacturers to design effective and convenient passive-restraint systems. The regulation required only 10% of a car manufacturer's production to include airbags. The Court in *Geier* held that state tort law, permitting liability to be imposed for failure to provide airbags, conflicted with the federal policy to encourage development of different restraint systems. *Id.* at 886.

[6] The district court here held that Arizona's requirement that employers use E-Verify was not preempted because, while Congress made participation in E-Verify voluntary at the national level, that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory. *Ariz. Contractors*, 534 F. Supp. 2d at 1055-56. We agree with that holding. Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation. It certainly knew how to do so because, at the same time, it did expressly forbid "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).

[7] Furthermore, this case is unlike *Geier*, where the Supreme Court found strong evidence of Congress's intent to promote competition and balance federal goals in a competitive environment encouraging alternative systems. Here, E-Verify is a federal government service that Congress has implicitly strongly encouraged by expanding its duration and its availability (to all fifty states). *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944, 1944; Basic Pilot Extension Act of 2001, Pub. L. No. 107-128, sec. 2, 115 Stat. 2407, 2407. Though Congress did not mandate E-Verify, Congress plainly envisioned and endorsed an increase in its usage. The Act's requirement

that employers participate in E-Verify is consistent with and furthers this purpose, and thus does not raise conflict preemption concerns.

Appellants contend that conflict preemption is a concern here also because of the Act's potentially discriminatory effects. Their argument is that E-Verify increases discrimination against workers who look or sound "foreign," and that mandatory E-Verify usage thus upsets the enforcement/discrimination balance that Congress has maintained by keeping E-Verify optional. This argument fails because Congress requires employers to use either E-Verify or I-9, and appellants have not shown that E-Verify results in any greater discrimination than I-9.

II. Due Process

The deprivation of a property interest must " 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' " *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). An Arizona business license is a property interest. *See, e.g., Comeau v. Ariz. State Bd. of Dental Exam'rs*, 993 P.2d 1066, 1070 (Ariz. Ct. App. 1999). An opportunity to be heard must be " 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Employers thus should be given an opportunity to be heard before their business licenses are suspended or revoked under the Act.

The Act sets forth the procedures to be followed in bringing an enforcement action. Any person may submit a complaint about a suspected violation to either the Arizona Attorney General or a county attorney. Ariz. Rev. Stat. § 23-212(B). The Attorney General or county attorney investigating a complaint must verify the alleged unauthorized alien's work-authorization status with the federal government pursuant to

8 U.S.C. § 1373; the state official is prohibited from attempting to make an independent determination of the alien's status. *Id.* After a complaint is investigated and found not to be false or frivolous, a county attorney must bring an enforcement action against the employer in state court in the county in which the alien was employed. *Id.* § 23-212(C), (D). The court is to expedite the action, which includes scheduling the hearing as quickly as is practicable. *Id.* § 23-212(E).

Subsection (H) of section 212 describes the state court's procedures to obtain information from the federal government on whether an alien was unauthorized to work:

> On [sic] determining whether an employee is an unauthorized alien, the court shall consider only the federal government's determination pursuant to 8 United States Code § 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 § 1373(c). *Id.* § 23-212(H). Section 1373(c) of title 8 of the U.S. Code provides that the Immigration and Naturalization Service "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).

Plaintiffs contend, in this facial challenge, that the Act violates due process because it deprives employers of their business licenses without providing them an adequate opportunity to dispute whether an employee was authorized to work. Plaintiffs rely on the first sentence of subsection (H) to argue

that the Act prohibits employers at the state-court hearing from presenting any evidence to rebut the federal government's § 1373 response on the issue of the employee's work status. Defendants, however, point to the second sentence of subsection (H), which provides that the federal response creates only a rebuttable presumption. They contend that the employer can rebut the federal response with other evidence during a hearing.

[8] Plaintiffs' interpretation of subsection (H) is flawed because it gives no meaning to the second sentence of the provision. That sentence at least implicitly contemplates a hearing to rebut the presumption created by the federal determination of an employee's unauthorized status. *See* Ariz. Rev. Stat. § 23-212(H). Arizona law, consistent with ordinary principles of statutory interpretation, requires that " '[e]ach word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial.' " *Williams v. Thude*, 934 P.2d 1349, 1351 (Ariz. 1997) (second alteration in original) (emphasis omitted) (quoting *City of Phoenix v. Yates*, 208 P.2d 1147, 1149 (Ariz. 1949)). We conclude that the statute provides an employer the opportunity, during the state court proceeding, to present rebuttal evidence.

Furthermore, defendants explain any apparent incongruity between the first two sentences of subsection (H) by pointing to parallel language found in an earlier subsection, subsection (B), which relates to the initial investigation of a complaint:

> When investigating a complaint, the attorney general or county attorney shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code § 1373(c). A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.

Ariz. Rev. Stat. § 23-212(B). Defendants explain that this section, like the first sentence of subsection (H), provides, somewhat inartfully, that the initial investigation and the basis for bringing an enforcement action must be limited to the federal response, thereby precluding independent state investigation. The employer would then have the opportunity to present evidence. The district court agreed. The district court persuasively reasoned that requiring the state or county to obtain a federal determination of an employee's work status before bringing proceedings may be intended to protect employees from direct investigation by the state.

[9] We therefore conclude that the district court correctly determined that the Act provides sufficient process to survive this facial challenge. More importantly, the district court also found that the statute does not preclude the presentation of counterevidence when an employer's liability is at issue, *Ariz. Contractors*, 534 F. Supp. 2d at 1058, and we agree with this interpretation. An employer's opportunity to present evidence at a hearing in superior court, in order to rebut the presumption of the employee's unauthorized status, provides the employer a meaningful opportunity to be heard before sanctions are imposed. We conclude that subsection (H) is facially constitutional.

The district court's judgment is **AFFIRMED**.