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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA CONTRACTORS ASSOCIATION, INC., et al.,

Plaintiffs-Appellants,

v.

CRISS CANDELARIA, et al.,

Defendants-Appellees.

And consolidated cases.

DEFENDANTS-APPELLEES' CONSOLIDATED ANSWERING BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Does federal law expressly preempt or conflict with Arizona Revised Statutes (A.R.S.) § 23-212, which permits sanctions against the licenses of employers that knowingly or intentionally hire unauthorized aliens, when 8 U.S.C. § 1324a(h)(2) specifically permits State sanctions for such conduct "through licensing or similar laws?"

2. Does A.R.S. § 23-214, which requires Arizona employers to use the federal E-Verify program to confirm that new employees are legally authorized to work in the United States, conflict with federal law because Congress has not mandated the use of this federal program for employers nationally?

3. Does A.R.S. § 23-212 survive a facial procedural due process challenge because it provides for notice and an evidentiary hearing before any sanctions are imposed?

4. Did the district court err in dismissing Defendants, state officials, in lawsuits challenging the constitutionality of the sanctions statute (A.R.S. § 23-212) and the statute requiring Arizona employers to participate in the federal E-Verify program (A.R.S. § 23-214) when those officials are not authorized to bring enforcement actions against employers who knowingly or intentionally hire unauthorized aliens or fail to use E-Verify?

STATEMENT OF THE CASE

This case involves a facial challenge to the constitutionality of the Legal Arizona Workers Act (the "Act"), A.R.S. §§ 23-211 through 214, enacted July 2, 2007. (ER 276-285.) The Act provides for the suspension or revocation of business licenses of employers that intentionally or knowingly employ an unauthorized alien, and it requires employers to use the federal E-Verify program to confirm that new employees are authorized to work in this country. (ER 279-281.) These requirements took effect January 1, 2008. A.R.S. § 23-212,-214.

Plaintiffs brought two separate actions challenging the Act in the District of Arizona. The Arizona Contractors Association, Inc., and various other business associations filed the first lawsuit (No. CV-07-1355-PHX-NVW) July 13, 2007. (ER 879, Dkt. #1.) That case named as defendants Arizona Governor Janet Napolitano and Arizona Attorney General Terry Goddard, and asserted violations of procedural and substantive due process, Commerce Clause, Supremacy Clause and the Fourth Amendment. Chicanos Por La Causa, Inc. and Somos America filed the second action (CV-07-1684-PHX-NVW) September 4, 2007. (ER 200-215.) That action also named Governor Janet Napolitano and Attorney General Terry Goddard as Defendants, and added Gale Garriott, Director of the Arizona Department of Revenue, and raised federal preemption and due process claims.

Both sets of Plaintiffs filed motions for preliminary injunction seeking to enjoin enforcement of the Act. (ER 882, Dkt. # 32; ER899, Dkt. #5.) Defendants opposed the motions and moved to dismiss, arguing that Plaintiffs' claims were not ripe for review, that Plaintiffs lacked standing, and asserting Eleventh Amendment immunity. (ER 885, Dkt. # 58; ER 882, Dkt. # 31; ER 883, Dkt. # 38.) The cases were consolidated ("*Contractors I*") and accelerated for trial on November 14, 2007 on stipulated facts and written evidence. (ER 883, Dkt. #36.) On December 7, 2007, the district court dismissed *Contractors I* for lack of subject matter jurisdiction, concluding that no justiciable controversy existed against the Defendants. (ER 119-120.)[1]

The district court found that the Plaintiffs lacked standing due to a lack of imminent threat of enforcement proceedings against them and because their Fourth Amendment rights were not violated as a result of signing the E-Verify Memorandum of Understanding. (ER 95:23-25,105:9-108:12.) The court also concluded that the Governor, Attorney General, and Director of Department of Revenue were not proper defendants because they have no enforcement authority under the Act. (ER 95:25-28, 114:3-118:3.) Plaintiffs appealed this ruling. (ER 194-99.)

[1] The court amended its ruling on December 10, 2007. (ER 94-118.)

In addition to appealing, both sets of Plaintiffs promptly filed new lawsuits. On December 9, 2007, the business associations brought a case (No. CV-07-2496-PHX-NVW), naming all the Arizona County Attorneys as Defendants, as well as Arizona Attorney General Terry Goddard and Fidelis V. Garcia, the Director of the Arizona Registrar of Contractors, and asserting the same claims as in their first complaint. (ER 151-193.) On December 12, 2007, Valle del Sol, Inc., Chicanos Por La Causa, and Somos America filed a second case (No. CV-07-2518-PHX-NVW), naming Maricopa County Attorney Andrew Thomas, Arizona Attorney General Terry Goddard, and Department of Revenue Director Garriott as Defendants, and asserting the same claims as their first complaint. (ER 133-150.) The district court again consolidated the two new cases ("*Contractors II*"). (ER 925, Dkt. #29.)[2]

Concurrently with their second lawsuits, Plaintiffs sought an injunction pending appeal in *Contractors I* to prevent the Defendants from implementing or enforcing the Act for the duration of the appeal, and a temporary restraining order and preliminary injunction in *Contractors II* seeking identical relief. (ER 890, Dkt. #91; ER 891, Dkt. #94; ER 921, Dkt. #4; ER 955, Dkt. #3.) On December 21, 2007, the district court denied the motions for injunction pending appeal in *Contractors I*, finding that Plaintiffs' hardship was minimal and the balance of

[2] Plaintiffs have abandoned all but their preemption and federal due process claims on appeal. (OB at 2.)

hardship weighed strongly against an injunction pending appeal, that an injunction would gravely injure the interests of the State, third parties, and the public interest, and that Plaintiffs had little likelihood of success on the merits. (ER 65-93.) By separate order the same day, the district court denied the motions for temporary restraining order in *Contractors II*, finding an insufficient likelihood that Plaintiffs would succeed on the merits, that it might be improper to issue a temporary restraining order that in reality was a declaratory judgment, that the balance of hardships was against Plaintiffs, and that there would be a full opportunity to address issues that might occasion relief at the January 16, 2008 preliminary injunction hearing. (ER 60-64.) On December 21, 2007, this Court deferred ruling on the motions for injunction pending appeal in *Contractors I* until the district court ruled in *Contractors II*.

By agreement of the parties, *Contractors II* was accelerated for trial on January 16, 2008, on stipulated facts and written evidence. (ER 57:17-20, 253-274.) On February 7, 2008, the district court entered judgment in favor of Defendants. (ER 13-52.) The district court again dismissed the claims against Arizona Attorney General Terry Goddard for lack of subject matter jurisdiction, on the basis that no justiciable case or controversy existed. (ER 51.) On the merits, the district court held that (1) the Act was not expressly preempted by the Immigration Reform and Control Act of 1986 ("IRCA"), which expressly

authorizes the licensing sanctions in the Act, (2) Congress did not occupy the field of licensing sanctions for employers of unauthorized aliens, (3) the Act does not regulate immigration, (4) the licensing sanctions provisions of A.R.S. § 23-212 and the requirement to use E-Verify found in A.R.S. § 23-214 do not conflict with the purposes and objective of Congress, (5) the Act provides employers with procedural due process, and (6) the Act does not violate the Commerce Clause because it does not regulate employees completely outside of Arizona.[3] (ER 25-50.) On February 8, 2008, Plaintiffs appealed this ruling. (ER 126-132.) On February 19, 2008, the district court denied Plaintiffs' motions for injunction pending appeal for the same reasons it denied the motions in *Contractors I.* (ER 1-12.) On February 28, 2008, this Court also denied an injunction pending appeal, consolidated the cases on appeal, and expedited the appeal.

STATEMENT OF FACTS

The Legal Arizona Workers Act ("the Act"), A.R.S. § 23-211 through 23-214 (Supp. 2007), has two distinct parts: (1) A.R.S. § 23-212 ("the sanctions statute"), which establishes sanctions against Arizona employers who knowingly or intentionally employ unauthorized aliens; and (2) A.R.S. § 23-214 ("the verification statute"), which requires Arizona employers to use the federal E-verify

[3] The Plaintiffs stipulated pre-trial to withdraw their separation of powers and Fourth Amendment claims. (ER 941, Dkt. #134.)

program to confirm that new employees are authorized to work in this country. Implementation of these new laws began January 1, 2008. (ER 275-285.)

A. The Sanctions Statute.

The Legislature specifically crafted the sanctions statute to fall within 8 U.S.C. § 1324a(h)(2), which expressly permits a state to impose sanctions by "licensing and similar laws" upon those who employ unauthorized aliens. The sanctions statute provides that Arizona employers "shall not intentionally employ an unauthorized alien or knowingly employ an unauthorized alien," and sets forth various sanctions to be taken against an employer's business license for violations of the statute. A.R.S. § 23-212(A). The State must use information obtained from the federal government pursuant to 8 U.S.C. § 1373(c) to establish immigration status in any enforcement action filed under the sanctions statute. A.R.S. § 23-212(B) and (H).

The Act defines "license" 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." A.R.S. § 23-211(7)(a). It includes articles of incorporation, a certificate of partnership, a foreign corporation registration, and a transaction privilege (sales tax) license, but excludes licenses issued under title 45 (governing water), title 49

(governing the environment), and any professional license. A.R.S. §§ 23-211(7)(b) and (c).

Both the Arizona Attorney General and the county attorneys are authorized to investigate complaints that an employer has employed an unauthorized alien. A.R.S. § 23-212(B). However, only county attorneys are authorized to bring proceedings under the sanctions statute. A.R.S. §§ 23-212(C)(3), A.R.S. § 23-212(D). If the investigating officer concludes that a complaint is not frivolous, federal immigration authorities and the local law enforcement agency must be notified of the unauthorized alien, and the Attorney General is required to notify the appropriate county attorney if the complaint was filed with the Attorney General. A.R.S. § 23-212(C). To prevent abuses, the Act provides criminal penalties for filing frivolous complaints. A.R.S. § 23-212(B).

Sanctions may not be imposed upon an employer until after a hearing in state court, where the court must determine that the employer "intentionally" or "knowingly" employed an unauthorized alien. A.R.S. § 23-212(E). Actions brought pursuant to the sanctions statute are governed by the Arizona Rules of Civil Procedure and newly adopted Rule 65.2, which became effective January 1, 2008, concurrent with the effective date of the sanctions statute. (Supp. ER 1-13.) Pursuant to this new rule, a court may not impose a sanction without first holding

an evidentiary hearing, unless all parties waive the hearing. Ariz. R. Civ. P. 65.2(g).

The sanctions statute provides employers with two affirmative defenses also found in federal law: it provides a rebuttable presumption of compliance for employers who have verified the employment authorization of their employees through the federal E-Verify program (compare A.R.S. § 23-212(I) with Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 402(b), Pub. L. 104-208, 110 Stat. at 3009-656); and replicates the federal affirmative defense that the employer "complied in good faith" with the I-9 system. Compare A.R.S. §§ 23-212(J) with 8 U.S.C. § 1324(a)(3).

The sanctions that a court may impose for adjudicated violations of A.R.S. § 23-212(A) vary. For a first-adjudicated, knowing violation during a three-year period, the employer is ordered to terminate the employment of all unauthorized aliens, to file quarterly reports of new hires for a three-year period of probation, and to file an affidavit within three days that it has terminated all unauthorized aliens and will not intentionally or knowingly employ an unauthorized alien. If the employer fails to file the affidavit on time, its business licenses are suspended until it does. A.R.S. § 23-212(F)(1)(a)–(c). The court also may suspend the business licenses for up to ten days after considering various factors, such as the number of unauthorized aliens employed, prior misconduct, the degree of harm resulting from

the violation, etc. A.R.S. § 23-212(F)(1)(d). For a first-adjudicated, intentional violation during a five-year period, the sanctions are the same except that the probation and reporting period is five years and suspension of business licenses is mandatory for a minimum of ten days. A.R.S. § 21-212(F)(2). For a second adjudicated, knowing or intentional violation during the period of probation, business licenses are permanently revoked. A.R.S. § 21-212(F)(3).

Employers found to have violated the sanctions statute have the usual panoply of appeal rights that exist for civil actions.

B. The Verification Statute.

After December 31, 2007, the verification statute requires Arizona employers, to use the federal government's E-Verify program to confirm that any newly hired employees are authorized to work in this country. A.R.S. § 23-214. Although participation in E-Verify is required, the statute imposes no penalty for failure to participate. The only consequence for failure to verify the employment authorization status of new hires through E-Verify is that an employer would be unable to avail itself of the rebuttable presumption set forth in A.R.S. § 23-212(I), although the affirmative defense of good faith compliance with the I-9 requirements found in A.R.S. § 23-212(J) would still be available.

E-Verify is an Internet-based system that the U.S. Citizenship and Immigration Service (USCIS) operates in partnership with the Social Security

Administration (SSA). E-Verify was designed to provide employers with greater confidence in their ability to verify their employees, while safeguarding employee rights. (ER 327.) E-Verify provides an automated link to federal databases to help employers verify the identity and employment eligibility of newly hired employees. The system electronically compares information submitted by the employee on the Employment Eligibility Verification Form I-9 with records maintained by the SSA and the Department of Homeland Security (DHS). Access to E-Verify is free to employers and available in all 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands. (Supp. ER 45; ER 310-312.)

To participate in E-Verify, an employer must register online and accept the electronic Memorandum of Understanding (MOU) that sets forth the terms of use. (ER 301-308.) USCIS has developed an E-Verify User Manual that contains step-by-step instructions for using the system, and provides an on-line tutorial. (Supp. ER 42-109.) Equipment requirements to utilize E-Verify are minimal. All that is needed is a personal computer and access to the Internet. (ER 310-312.)

According to the USCIS, "E-Verify is currently the best means available for employers to verify electronically the employment eligibility of their newly hired employees. E-Verify virtually eliminates Social Security mismatch letters, improves the accuracy of wage and tax reporting, protects jobs for authorized U.S.

workers, and helps U.S. employers maintain a legal workforce." (ER 310-312.) A 2002 survey and evaluation observed that "an overwhelming majority of employers participating found [E-Verify] to be an effective and reliable tool for employment verification." (ER 319.) Ninety-six percent of employers found E-Verify to be an effective tool. Ninety-four percent believed the E-Verify process is more reliable than the process used previously. (ER 338.) Ninety-three percent reported that it was easier than the I-9 process, and 92% reported that it did not overburden their staff. (ER 356.) A majority of employers in the 2002 survey spent under $500 for E-Verify start-up costs and under $500 annually for operating costs. Annual operating costs averaged $1,800, with about 85% of the employers spending less than $3,500, and over half spending less than $500. (ER 320, 357.) In a 2006 SSA survey of fifty users with a large volume of verification requests, 100% rated the program "Excellent," "Very Good," or "Good." (ER 414.)

C. The Notice Requirement.

To ensure that Arizona employers were aware of and prepared for the Act, the Legislature required the Director of the Arizona Department of Revenue to send a notice by October 1, 2007, well in advance of the implementation date, to all Arizona employers required to withhold income taxes to inform them of the terms of the Act. 2007 Ariz. Sess. Laws, Ch. 279, § 3. The Department of Revenue sent this notice, as required, on October 1, 2007. (ER 297-299.)

D. Implementation of the Act.

Beginning January 1, 2008, the Arizona Attorney General and any county attorney began investigating any complaints they received concerning the employment of unauthorized aliens. Nothing in the record indicates that any of the Plaintiffs has been threatened with any enforcement action under the Act.[4]

SUMMARY OF THE ARGUMENT

The central claim in this litigation concerns whether federal law preempts the Act. There are two distinct provisions in the Act that are subject to the preemption challenge. First, Plaintiffs challenge A.R.S. § 23-212, which authorizes sanctions against employers that knowingly or intentionally employ unauthorized aliens. Second, Plaintiffs claim that federal law preempts the E-Verify requirement in A.R.S. § 23-214.

Federal law does not preempt the employer sanctions in A.R.S. § 23-212 because Congress has expressly stated to the contrary in 8 U.S.C. § 1324a(h)(2) by carving out a savings clause to preserve state authority to impose sanctions through licensing and similar laws. Because the Act falls within this savings clause, Plaintiffs' express preemption claims fail. Moreover, there is no conflict

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[4] On April 28, 2008, the Arizona State Senate approved HB 2745 which amends the Act. Because the Legislature passed this bill with an emergency clause, it will take effect immediately if the Governor signs it. The bill, as approved by the Legislature, can be found at http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/2r/bills/hb2745h.htm.

preemption because Arizona's law is consistent with the limitations in § 1324a(h)(2) and the broader purposes of federal immigration law. The Act and IRCA both aim to ensure that employers hire people who are legally authorized to work in this country.

Plaintiffs' claim that Congress preempted Arizona's E-Verify requirement also fails. Requiring employers in Arizona to use the E-Verify system does not create any conflict with the legislation governing the program. Although federal law does not mandate E-Verify nationally, nothing in the relevant federal statutes precludes a state from requiring employers within its boundaries to use the federal verification system.

Plaintiffs' procedural due process claims fail because the Act provides notice and a hearing in state court before any sanctions can be imposed against an employer. Plaintiffs' due process claim relies on an unduly restrictive reading of A.R.S. § 23-212(H) that would prevent employers from rebutting the government's evidence concerning an employee's immigration status. Even if the statute is interpreted—as Defendants believe it should be—to permit employers to present rebuttal evidence, no due process problem exists. Moreover, even under Plaintiffs' restrictive interpretation, Plaintiffs' facial challenge fails because they do not establish that the statute cannot under any set of facts comport with due process requirements.

Finally, the district court correctly dismissed *Contractors I* because the lawsuit did not present a justiciable controversy. The only Defendants were the Governor, the Attorney General, and the Director of the Department of Revenue, and none of these Defendants has the authority to bring enforcement actions under the Act. In addition, because they lack enforcement authority, the Eleventh Amendment bars claims against them to enjoin the Act. Plaintiffs remedied these jurisdictional defects in *Contractors II* by suing the county attorneys, who are the only officials authorized to bring actions against employers under the Act.

STANDARD OF REVIEW

This Court reviews the legal conclusions of the trial court *de novo*. *See, e.g., NCAA v. Miller,* 10 F.3d 633, 637 (9th Cir. 1993). Findings of fact are reviewed for clear error. *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000).

ARGUMENT

I. Federal Law Does Not Preempt the Act.

Although Congress has the authority to preempt state legislation, it has not preempted the Act. Defendants do not question the federal government's authority over immigration or the significance of IRCA to American immigration law. But state legislation that touches on immigration is not *per se* preempted. States may enact legislation that affects immigrants and immigration-related matters provided

that they comply with constitutional principles. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 225-226 (1982) (recognizing that state may "borrow" the federal classification concerning who is not legally in this country and analyzing the state's use of this classification under equal protection requirements); *DeCanas v. Bica*, 424 U.S. 351, 355 (1976) (applying preemption analysis to determine the constitutionality of California law prohibiting employment of unauthorized workers); s*ee also Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1011 (9th Cir. 2007) (holding that federal immigration law did not preempt California employment law); *Madeira v. Affordable Housing Found., Inc.*, 469 F.3d 219, 239 (2d Cir. 2006) (holding that the IRCA did not preempt state law that permitted unauthorized immigrant to receive workers compensation benefits).

While delineating the constitutional limits on state authority, the Supreme Court has repeatedly recognized the important state interests affected by illegal immigration. In *DeCanas,* the Court acknowledged that state legislation concerning the employment of unauthorized aliens was in the "mainstream of [state] police power." 351 U.S. at 356. Recognizing that illegal immigration may "deprive[ ] citizens and legally admitted aliens of jobs" and "depress wage scales and working conditions of citizens and legally admitted aliens," the Court acknowledged that states have an interest in addressing "local problems" that may