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

result from illegal immigration. *Id.* at 356-57. In *Plyler*, the Supreme Court again acknowledged the state interest in immigration-related legislation:

> [a]lthough the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service. *Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.*

450 U.S. at 228 n.23 (citation omitted) (emphasis supplied).

The Act addresses important state interests in having a lawful workforce, and it does so in a manner that is consistent with federal law. Indeed, the employer sanctions were crafted to fall within the exception from preemption for state laws imposing sanctions through "licensing and similar laws." 8 U.S.C. § 1324a.

As explained below and in the district court's opinion, federal law does not preempt either the employer sanctions in A.R.S. § 23-212 or the E-Verify requirement in A.R.S. § 23-214.

A. Federal Law Does Not Preempt Arizona's Sanctions Statute.

In *DeCanas*, the critical United States Supreme Court case concerning implied preemption of state laws relating to the employment of undocumented immigrants, the Supreme Court rejected a claim that federal law preempted a

California statute prohibiting employers from hiring aliens who were not entitled to lawful residence in the United States. The Court addressed whether the state law (1) attempted to regulate immigration;[5] (2) regulated in an area in which the federal government had occupied the field; and (3) conflicted with federal law. *DeCanas*, 424 U.S. at 358-64. Although the Supreme Court decided *DeCanas* before Congress enacted IRCA, its analysis establishes the framework for implied preemption analysis in the immigration context, and the Supreme Court has never modified its holding.

In rejecting the preemption challenge in *DeCanas*, the Supreme Court applied traditional preemption principles. The intent of Congress is the "touchstone" of any preemption analysis. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). The preemption analysis begins "with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was a clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Courts do not infer that "Congress

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[5] Although it is not an issue in this appeal, the Court explained in *DeCanas* that the regulation of immigration "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." 424 U.S. at 355. Applying this test, the Supreme Court concluded that the California law at issue did not regulate immigration because it imposed sanctions based on the federal standards regarding who is authorized to work in this country. *Id.*

ha[s] deprived the States of the power to act." *N.Y. Tel. Co. v. N.Y. State Dep't of Labor,* 440 U.S. 519, 540 (1979).

When it enacted IRCA in 1986, Congress specifically recognized the States' legitimate interest in ensuring a lawful workforce by preserving some state authority to impose sanctions on employers who hire unauthorized aliens. *See* 8 U.S.C. § 1324a(h)(2). Although Plaintiffs argue that Congress intended preemption of all state authority to impose sanctions against employers, its language in § 1324a(h)(2) does not support Plaintiffs' claim.

1. Federal Law Expressly Authorizes State Sanctions through "Licensing and Similar Laws."

The express-preemption analysis of Arizona's sanctions against employers that knowingly or intentionally employ unauthorized aliens centers on 8 U.S.C. § 1324a(h)(2), which provides:

> 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.

(emphasis added.)

The Act does not impose civil or criminal sanctions that § 1324a(h)(2) precludes. As permitted by federal law, it provides for the suspension or revocation of business licenses under certain circumstances. A.R.S. § 23-212(F).

As the district court noted, Arizona's definition of license in A.R.S. § 23-211 is consistent with the "common sense or traditional understandings of what is a license." (ER 26) (citing Black's Law Dictionary of "license" which is "permission, usually revocable, to commit some act that would otherwise be unlawful"). Because the Act imposes sanctions "through licensing and similar laws," § 1324a(h)(2) does not expressly preempt it and, in fact, expressly excepts it from preemption.

The language of the relevant federal law does not support Plaintiffs' argument that Congress required a federal finding that an employer has violated § 1324a before a state could impose sanctions "through licensing or similar laws." 8 U.S.C. § 1324a(h)(2). Federal law permits state sanctions "through licensing and similar laws . . . upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." Nothing in this language requires any prior federal action against the employer before a state may impose sanctions against a license of an entity that employs unauthorized aliens.

In enacting IRCA, Congress could have preempted any state sanctions for the employment of unauthorized aliens, but it did not do so. It expressly preempted certain types of sanctions—civil and criminal penalties—while specifically preserving state authority to impose sanctions "through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). This Congressional policy decision respects

the traditional role of states over workers in their states. *See DeCanas*, 424 U.S. at 356 (acknowledging state interest in authorized work force).

Because of the important local interests involved, the historical lack of federal preemption of state sanctions against employers that hire unauthorized aliens, and--most important--the explicit Congressional language in § 1324a(h)(2), Plaintiffs' reliance on *United States v. Locke*, 529 U.S. 89 (2000) is misplaced. (OB at 24.) In *Locke*, the Supreme Court interpreted a savings clause in a manner that was consistent with the "settled division of authority" between state and federal control in matters relating to maritime commerce. *Locke*, 529 U.S. at 106. In contrast, before Congress enacted IRCA, the "settled division of authority" permitted state sanctions against employers that hire unauthorized aliens. *DeCanas*, 424 at 356. Section 1324a(h)(2) specifically answers the preemption question after IRCA by preserving state authority to impose sanctions through licensing and similar laws.

Plaintiffs argue that an exclusive federal sanctions system is necessary to avoid balkanization of employer sanctions laws and "patchwork regulation." (OB at 26-27.) But, the interest in uniformity is not "unyielding." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 70 (2002). Plaintiffs' policy arguments ignore the states traditional role, which Congress explicitly recognized in IRCA, and the plain language in § 1324a(h)(2) that permits state sanctions through licensing and similar

laws. And, nothing in IRCA purports to establish that a federal proceeding under section 1324a is the exclusive process for determining whether a business knowingly or intentionally employs an unauthorized alien.

The legislative history that Plaintiffs rely on to support their argument that a federal enforcement action is necessary before a state may impose sanctions against an employer under the savings clause in § 1324a(h)(2) does not—and cannot—alter the scope of preemption described in 8 U.S.C. § 1324a(h)(2). The "authoritative statement is the statutory test, not the legislative history." *Exxon Mobil Corp. v. Allapatah Servs., Inc.*, 545 U.S. 546, 568 (2005); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150 n.4 (2002) (describing House Report No. 99-682 as a "single Committee Report from one House of a politically divided Congress" and noting that the dissent's reliance on the report "is a rather slender reed"); *Sprietsma*, 537 U.S. at 62-63 (acknowledging that express preemption analysis focuses on plain wording of statute). Based on the plain statutory language, no prior federal enforcement action is necessary before a state may impose sanctions against an employer's license.

Plaintiffs focus on language in a House Report, which 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), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

Plaintiffs' argument assumes that this language means there must have been a federal proceeding before a state may impose sanctions against an employers' license, but the report does not say that. The first sentence explains—as the statutory language states—that only "civil fines and/or criminal sanctions" are preempted. *Id.* The Act imposes no sanction that this sentence suggests is preempted. The first sentence in the second paragraph refers to "state or local processes," which could be read to suggest that a state or local process has "found" a violation. The final sentence of this excerpt also undermines Plaintiffs' theory because, as the district court concluded, it describes state laws that "are not tied to completed federal violation proceedings." (ER 29.) At best, the Report's language is ambiguous, and it certainly cannot justify ignoring the statute's unambiguous language permitting state sanctions through licensing and similar laws.

Plaintiffs also incorrectly assert that the interaction between the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. § 1801, *et seq.*,

and IRCA supports their express preemption theory. (OB at 30.) To the contrary, the AWPA itself expressly preserves state authority by acknowledging that the federal law "is intended to supplement state law, and compliance with this chapter shall not excuse any person from compliance with appropriate state law and regulation." 29 U.S.C. § 1871. The federal law again reflects Congress's respect for the traditional role of states in regulating employment within their jurisdiction. IRCA's conforming amendments to the AWPA that Plaintiffs reference merely permit the United States Secretary of Labor to suspend, revoke or refuse to issue a federal farm labor contract certificate if the employer has been found to violate IRCA. IRCA § 101(b)(1)(B) (codified at 29 U.S.C. § 1813(a)). These amendments do not support the conclusion that Congress intended to broadly preempt the states' ability to revoke or suspend licenses of employers that knowingly or intentionally employ unauthorized aliens. Indeed, the language in 8 U.S.C. § 1324a(h)(2) makes clear that Congress intended just the opposite. In addition, the reference to "state farm labor contractor laws" in the House Report recognizes that IRCA, like the AWPA, did not preempt state farm labor contractor laws. H.R. Rep. No. 99-682(I) at 58, 1986 USCCAN at 5662.

Plaintiffs also incorrectly assert that A.R.S. § 23-212 is not a "licensing or similar law." (OB at 28.) The sanctions in the statute, however, are against business licenses as defined in the Act. For that reason, the sanctions fall well

within the savings clause in § 1324a(h)(2). IRCA does not define the term "license," and its savings clause extends to "licensing *and similar laws*," suggesting it is not limited to a narrow type of state license.

Plaintiffs also argue that the Act imposes sanctions against legal instruments that are not "licenses," such as articles of incorporation. (OB at 28.) To become authorized to do business as an Arizona corporation, an entity must file articles of incorporation with the Arizona Corporation Commission. A.R.S. § 10-201.[6] Even before the Act, Arizona law established procedures for dissolving corporations for certain violations of law through administrative or judicial proceedings. A.R.S. §§ 10-1420 to -1422 (administrative dissolution); 10-1430 to -1434 (judicial dissolution). Revoking the authority to operate as an Arizona corporation is consistent with Congress's express authorization of state sanctions affecting "licensing or similar laws." The same is true of "a certificate of partnership, a partnership registration or articles of organization under Title 29,"[7] A.R.S. § 23-211(7)(b)(ii), and a "grant of authority issued under Title 10, Chapter 15,"[8] A.R.S. § 23-211(7)(b)(iii). Business entities must file these documents in order to have the authority to engage in certain conduct and to receive certain protections

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[6] The articles of incorporation for business development corporations are filed with the superintendent of financial institutions. A.R.S. § 10-2260.

[7] Chapter 29 includes various registration information that partnerships, limited partnerships, and limited liability companies must file under Arizona law.

[8] Chapter 15 of title 10 governs foreign corporations, which must register with the Secretary of State before transacting business in Arizona. *See* A.R.S. § 10-1503.

provided by Arizona law. In that way, they are licensing laws or, at the very least, similar to licensing laws, and are within the preemption exception in § 1324a(h)(2).[9]

Finally, Plaintiffs argue that the reference to "licensing" in § 1324a(h)(2) refers only to issuing licenses, suggesting it does not permit states to take action to suspend or revoke a license. (OB at 30.) As the district court recognized, "[t]his construction ignores that licenses are revocable, so states must have the power to create revocation criteria and procedures." (ER 26.) This argument is also contradicted by the House Report on which Plaintiffs rely, which specifically refers to suspension and revocation of licenses. H.R. Rep. No. 99-682(I) at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662 (IRCA "not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person . . . ."). A sanction in the

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[9] In this facial challenge, Plaintiffs have not established that they have standing to challenge all of the possible licenses in Title 10 (corporations) or any of the licenses in Title 29 (partnerships). Because Arizona has the authority to impose sanctions against licenses pursuant to 8 U.S.C. § 1324a(h)(2), it survives a facial challenge. *United States v. Salerno*, 481 U.S. 739, 745 (1987); see also ER 27. ("[T]he Act is not facially invalid if its definition sometimes exceeds the savings clause for "licensing laws"). Plaintiffs are free to raise this defense if and when the State applies its law to revoke a legal instrument that they believe falls outside of 8 U.S.C. § 1324a(h)(2). Even if the Court accepted Plaintiffs' argument about the scope of the definition of "license," it does not justify enjoining the entire sanctions statute because the Act includes a severability clause directing that any invalid portions be severed from the valid provisions. *See* 2007 Ariz. Sess. Laws, ch. 279, § 5.

licensing context typically includes suspension or revocation, which are the sanctions provided in the Act.

Based on the plain language of 8 U.S.C. § 1324a(h)(2), IRCA does not expressly preempt Arizona's sanctions statute, A.R.S. § 23-212.

2. The Sanctions Statute Does Not Conflict with Federal Law.

Conflict preemption exists when "compliance with both State and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Gade v. Nat'l Solid Wastes Mgm't Ass'n*, 505 U.S. 88, 98 (1992) (citing *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). Conflict preemption is not implied absent an "actual conflict." *English v. Gen. Elec. Co.,* 496 U.S. 72, 90 (1990) (citation omitted). "Tension between federal and state law is not enough to establish conflict preemption." *Incalza v. Fendi N. Am., Inc.,* 479 F.3d at 1005, 1009 (quoting *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 256 (1984)).

The sanctions statute does not conflict with any provision of federal law or create an obstacle to the execution of Congress's objectives. By enacting A.R.S. § 23-212, the Arizona Legislature exercised the authority to impose sanctions through licensing and similar laws that Congress reserved for the states in § 1324a(h)(2). In passing the federal law prohibiting the employment of unauthorized aliens, "Congress wished to stop payments of wages to unauthorized

workers, which act as a magnet . . . attract[ing] aliens here illegally, and to prevent those workers from taking jobs that would otherwise go to citizens." *Incalza,* 479 F.3d at 1011 (internal quotation marks and citation omitted). Both federal law and the Act aim to prohibit the employment of unauthorized aliens, and the Act accomplishes this goal through sanctions that do not conflict with federal law. "Where state enforcement activities do not impair federal regulatory interests, concurrent enforcement activity is authorized." *Gonzales v. City of Peoria,* 722 F.2d 468, 474 (9th Cir. 1983) (citing *Fla. Avocado Growers v. Paul,* 373 U.S. 132, 142 (1963)), *overruled on other grounds by Hodgers-Durgin v. de la Vina,* 199 F.3d 1037 (9th Cir. 1999).

Plaintiffs incorrectly assert that allowing state courts to determine whether to impose sanctions against an employer for knowingly hiring unauthorized immigrations conflicts with IRCA. (OB at 45.) Under the Act, no sanctions may be imposed until a state court determines that the employer has knowingly or intentionally employed unauthorized aliens. A.R.S. § 23-212(A) and (F). Nothing in IRCA suggests that a federal enforcement proceeding is the exclusive procedure for determining whether an employer has knowingly or intentionally hired an unauthorized alien. Indeed, under IRCA, individual employers are responsible for determining whether their employees are authorized aliens and must terminate employees who do not meet the federally established standards. *Hoffman Plastic*

Compounds, Inc. v. NLRB, 535 U.S. 137, 148 (2002). In addition, the federal hearings described in IRCA specifically apply only to proceedings to impose federal sanctions. *See* 8 U.S.C. § 1324a(e)(3)(A) (explaining that federal notice and hearing procedures apply "[b]efore imposing an order described in paragraph (4), (5) or (6) against a person or entity under this subsection for a violation of subsection (a)"). Congress could have required a federal proceeding before a state imposes sanctions through state licensing laws, but it did not do so in IRCA.

State courts generally have authority to resolve questions involving state or federal law. *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (concluding that state courts have jurisdiction over federal RICO claims). Although federal courts have exclusive jurisdiction over deportation proceedings, 8 U.S.C. § 1229a, neither the Supreme Court nor Congress has precluded state courts from determining whether an employer is knowingly employing unauthorized aliens within that state or making other determinations regarding a person's immigration status when necessary to apply state law.

Plaintiffs' claim that Congress decided "*how* employers should be found to have knowingly employed an unauthorized alien" (OB at 47-48) is not accurate with regard to state sanctions through licensing laws. Congress did not establish procedural requirements for states to follow when imposing sanctions under 8 U.S.C. § 1324a(h)(2). Plaintiffs also incorrectly claim that procedural differences

between the Act and IRCA result in conflict preemption. (OB at 47-48.) The preemption doctrine does not require that state laws replicate federal laws and procedures. Because IRCA established no procedural requirements for state proceedings to impose sanctions through licensing and similar laws, Arizona's procedural requirements do not create actual conflict with federal law or pose an obstacle to complying with federal law. Plaintiffs complain that the Act requires county attorneys and the attorney general to investigate complaints that they receive concerning allegations that employers hire unauthorized aliens, but such a requirement creates no conflict with federal law. They also complain that the Act restricts the employers' ability to present evidence in a state enforcement proceeding, but, as explained in the discussion of due process further in this brief, their argument is based on an incorrect reading of the statute. It also does not provide the basis for conflict preemption.

Because IRCA did not preempt state authority to impose sanctions against employers through licensing and similar laws, theoretically, a state court judge might reach a different conclusion than a federal administrative law judge concerning whether an employer knowingly employed unauthorized aliens. This theoretical possibility arises any time federal and state authorities both have enforcement authority in an area. But, particularly where Congress specifically preserved state authority to impose sanctions through state licensing laws as

Arizona has done through the Act, the possibility of different outcomes does not mean state action is preempted.

The district court accurately pointed out that the theoretical risk of a different result in state and federal proceedings against an employer is minimized by the Arizona statute's use of information that the federal authorities provide to state authorities under 8 U.S.C. § 1373(c). (ER 49.) Under Arizona's statute, the county attorneys rely on information that federal authorities provide to establish an employee's immigration status. A.R.S. § 23-212. The statute appropriately relies on 8 U.S.C. § 1373 because that is the statute through which Congress requires federal authorities to give state and local officials information regarding a person's citizenship or immigration status. The use of information provided under 8 U.S.C. § 1373(c) is discussed in more detail in the due process portion of the brief. *See* § II(A) infra, for the conflict preemption analysis, the important point is that Arizona's statute uses 8 U.S.C. § 1373(c) in a manner consistent with federal law.[10]

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[10] Contrary to Plaintiffs' assertions (OB at 46 n.11), information provided under 8 U.S.C. § 1373(c) is relevant to determining whether a person is an unauthorized alien. Plaintiffs correctly note that many categories of non-citizens may be authorized to work in this country. Plaintiffs incorrectly assume, however, that the information received under 8 U.S.C. § 1373(c) will not include information necessary to determine work authorization. It is not appropriate to engage in such speculation in a facial challenge of a statute. *Washington State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184, 1190-01 (March 18, 2008). Moreover, as a practical matter, if the information from the federal authorities does not establish

Plaintiffs' contention that the Act's serious sanctions "frustrate IRCA's objectives" (OB at 48) is incorrect because IRCA explicitly preserved state authority to impose sanctions against business licenses. Before Congress enacted IRCA in 1986, states had the authority to impose penalties against employers that hire unauthorized aliens. *See DeCanas*, 424 U.S. at 354-356. Employer sanctions, such as the California law reviewed in *DeCanas,* supported "Congress' intention to bar from employment all aliens except those possessing a grant of permission to work in this country." *Plyler,* 457 U.S. at 225 (citing *DeCanas,* 424 U.S. at 361). The state sanctions "mirror[ed] federal objectives and further[ed] a legitimate state goal." The same is true of employer sanctions after IRCA, provided that states impose sanctions within the savings clause in 8 U.S.C. § 1324a(h)(2).

Congress preserved the states' authority and discretion to adopt sanctions through their "licensing and similar laws" as they deem appropriate. As the district court observed, Congress may have recognized that the "pervasive adverse effects of [unauthorized alien labor] falls directly on the states." (ER 34, citing *DeCanas,* 424 U.S. at 356-57; *Plyler,* 457 U.S. at 228 n.3.) It, therefore, "could reasonably conclude that states are better equipped than Congress to judge which licenses to sanction, and how much." (*Id.*) Congress left the strong deterrence of licensing

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that a person is an unauthorized alien, it means that the county attorney cannot satisfy his burden of proof in an enforcement action under Arizona's sanctions statute.

sanctions to individual states to implement. (*Id.*) Preserving the authority of states to impose sanctions is an important part of the balance that Congress struck when it enacted IRCA.

The lack of additional anti-discrimination protections in the Act also does not create a conflict with federal law. (OB at 49.) Nothing in the Act undermines the protections against discrimination in state and federal law. *See, e.g.,* 8 U.S.C. § 1324b (prohibiting discrimination based on national origin or citizenship status); 42 U.S.C. § 2000e-2 (prohibiting employment discrimination based on "race, color, religion, sex, or national origin"); A.R.S. § 41-1463(B) (prohibiting employment discrimination based on "race, color, religion, sex, age, disability or national origin"). The Arizona Legislature also explicitly required that the Act "shall not be construed to require an employer to take any action that the employer believes in good faith would violate federal or state law." A.R.S. § 23-213. Thus, the lack of an additional anti-discrimination provision in the Act does not conflict with federal law.

Although Plaintiffs argue that "stronger employer sanctions must be matched by stronger protections against discrimination" (OB at 50 n. 14), IRCA does not support this conclusion. Congress chose to adopt legislation that included both sanctions and additional anti-discrimination measures, but IRCA does not require that states adopt additional anti-discriminatory laws if they impose

sanctions through state licensing laws.[11] This is not a case in which a state inappropriately rejected "Congress' decisions about how to balance competing objectives." (OB at 51.) Instead, Arizona is carefully following Congress's directives by enacting sanctions that fall within IRCA's savings clause in § 1324a(h)(2).

Plaintiffs also criticize the Act for including an affirmative defense for employers that in good faith comply with the I-9 process. (OB at 51-52.) They claim that because federal law prohibits use of the I-9 documents "for purposes other than enforcement of [IRCA]," employers cannot use the affirmative defense that Arizona law provides. (*Id.*) This is not correct. As the district court concluded (ER 38: 24-27), replication of the federal affirmative defense of I-9 compliance is not prohibited by 8 U.S.C. § 1324a(B)(4) and (5). That subsection ensures that the government does not use I-9 forms for purposes outside of IRCA. Enabling employers to establish good faith compliance with the I-9 process in a state proceeding to impose sanctions authorized by 8 U.S.C. § 1324a(h)(2) is entirely consistent with IRCA.[12]

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[11] Relying on the district court's decision in *Lozano v. Hazelton*, 496 F.Supp.2d 477 (M.D. Pa. 2007), Plaintiffs speculate that Arizona's sanctions might result in more discrimination. (OB at 50.) Again, such speculation has no place in a facial challenge of a statute. *Washington State Grange*, 128 S.Ct. at 1190-91.

[12] This is another issue on which Plaintiffs rely on speculation to support their challenge to the Act. Even if, for the sake of argument, § 1324a(b)(5) precluded the use of the I-9 forms themselves in a State court proceeding, an employer could

Plaintiffs' conflict preemption arguments miss the mark by failing to apply the appropriate test and by ignoring the core purpose of IRCA. Plaintiffs argue that IRCA "was designed to limit the risk to business," (OB at 48) but they ignore the sanctions authority that Congress specifically preserved for the states. More fundamentally, they ignore that IRCA is designed to stop the employment of unauthorized workers and to prevent unauthorized workers "from taking jobs that would otherwise go to citizens." *Incalza,* 479 F.3d at 1011.[13] Arizona's statute supports that purpose and does so in a manner that is consistent with the authority Congress explicitly preserved for states in section 1324a(h)(2). Plaintiffs argue that they fear a patchwork of inconsistent laws, but Arizona's sanctions statute imposes no new obligation on employers. It merely imposes state sanctions if they fail to follow the standard that Congress set in IRCA when it prohibited the employment of unauthorized aliens. That is the single, national standard that applies.

None of the cases on which Plaintiffs rely supports a finding of conflict preemption in this case. First, in *Geier v. Honda Motor Company*, 529 U.S. 861

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prove good faith compliance with the I-9 process through some other type of evidence.

[13] *See also Peter H. Schuck, Taking Immigration Federalism Seriously*, 2007 U. Chi. Legal F. 57, 79-80 (2007). ("[I]t is hard to see how state employer sanctions provisions that are carefully drafted to track the federal employer sanctions law can be inconsistent with it – unless we take ineffective enforcement to be the 'real' federal policy from which state law must not deviate.")

(2000), the Supreme Court concluded that imposing tort liability on a manufacturer for failing to include driver-side airbags was an obstacle to the federal objective to "gradually develop[] [a] mix of alternative passive restraint devices for safety-related reasons." *Id.* at 886. That holding has no application here because Arizona's law fully supports the language and purpose of IRCA.

Ray v. Atlantic Richfield Co., 435 U.S. 151, 163 (1978), addressed whether the Ports and Waterways Safety Act of 1972 preempted Washington State's efforts to regulate tankers in Puget Sound and illustrates the detailed statutory analysis that is necessary to determine whether Congress has preempted a state law. In that case, the federal statutory scheme at issue foreclosed more stringent state standards for oil tankers. *Id. Ray's* analysis does not inform the issue here where Congress specifically authorized state sanctions through a savings clause.

Garner v. Teamsters Local Union No. 776, 346 U.S. 485 (1953), also does not resolve the issues here. *Garner* analyzed whether the National Labor Management Relations Act preempted a business's state court action to enjoin union picketing. In concluding that federal law preempted such an action, the Court noted that seeking remedies through federal and state procedures could result in a conflict "and there is no indication that the statute left it open for such conflicts to arise." *Id.* at 499. The Court made it clear that Congress "can save alternative or supplemental state remedies by express terms, or by some clear

implication, if it sees fit." *Id.* at 501. Congress did just that in 8 U.S.C. § 1324a(h)(2) by preserving state sanctions through licensing and similar laws.

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) is another case on which Plaintiffs rely that discusses conflicts through "separate remedies . . . on the same activity." (OB at 53, quoting *Crosby,* 530 U.S. at 379-80 (internal quotations omitted.)) *Crosby*, however, addressed foreign affairs, rejecting a state's attempt to impose its own sanctions against the government of Burma when Congress had chosen a different strategy. There, the Supreme Court recognized that the state's sanctions undermined the authority of the President "to speak for the Nation with one voice" on a foreign policy matter. In contrast here, significant local interests are at stake, *see DeCanas*, 351 U.S. at 356, and the congressional scheme specifically preserves state authority, 8 U.S.C. § 1324a(h)(2).

As the district court correctly concluded, Arizona's sanctions statute does not conflict with IRCA.

B. Federal Law Does Not Preempt Arizona's E-Verify Requirement.

Plaintiffs incorrectly argue that Arizona law cannot require its employers to use the federal E-Verify system because federal law prohibits the Secretary of Homeland Security from requiring participation. (OB at 33-44.) This conflict preemption argument fails because, although federal law has not required all employers throughout the country to use E-Verify, nothing in federal law prohibits

a state from requiring employers within its boundaries to participate in the federal verification program. There is no conflict preemption because participating in E-Verify, as Arizona law requires, does not place an employer in violation of federal law, or create an obstacle to accomplishing congressional goals. *See, Incalza*, 479 F.3d at 1009 (stating conflict preemption principles). Congress has mandated an employee verification system to prevent the employment of unauthorized aliens, and Arizona's use of E-Verify should help further that goal. Congress also authorized the creation of E-Verify to improve the verification system, and Arizona's E-Verify requirement should help advance that federal goal.

Plaintiffs rely on *Geier* to support their conclusion that Arizona's E-Verify requirement conflicts with federal law. In *Geier*, the Court determined that imposing state tort liability for failing to provide driver-side airbags conflicted with federal law that gave manufacturers a choice of safety systems. *Geier*, 529 U.S. at 879. The Court concluded that requiring a specific safety device through state tort liability conflicted with the federal regulations in the area. *Id.* at 881. There, the private market place developed the options, and the law "allow[ed] more time for manufacturers to develop airbags or other, better, safer passive restraint systems." *Id.* at 879.

Although mandating a specific safety device through state tort liability undermined the federal goals in *Geier*, but the same is not true here. *Cf. Spreitsma*,

537 U.S. at 65-70 (finding no federal preemption of state tort liability for failure to install propeller guard even though federal regulations did not require propeller guards). Requiring E-Verify in a particular State supports the federal government's goals of ensuring that there is a lawful workforce and developing a more effective employee verification system. Plaintiffs' preemption analysis ignores these congressional goals entirely. There is no dispute that the I-9 verification process is deficient, and those deficiencies prompted Congress to require the development of pilot programs for employee verification.

The federal Department of Homeland Security is strengthening and expanding the E-Verify program and supports State efforts to expand the use of E-Verify. (Supp. ER 16.) The federal agency's support of efforts to expand the use of E-Verify undermines Plaintiffs' claim. *Cf. Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 681 (2003) (agency's interpretation of federal Medicaid Act "imposes a perhaps-insurmountable barrier to a claim of obstacle preemption").

Although Plaintiffs point to deficiencies identified in a September 2007 program evaluation of E-Verify to support their conflict preemption argument, that report suggests that requirements such as Arizona's will help improve the E-Verify program. One of the barriers to the E-Verify program has been the lack of employer participation, and Arizona's E-verify requirement should help address that issue. (ER 640) (E-Verify's limited use "place[es] limitations on its

effectiveness in preventing unauthorized employment on a national basis"); ER 799 (increasing the use of E-Verify increases its "ability to deter unauthorized employment"). Plaintiffs' concerns about the accuracy of the E-Verify database (OB at 42) are really policy arguments against the E-Verify requirement rather than arguments supporting federal preemption.

In Congress, the E-Verify debate centers on whether the program should be mandated nationally (Supp. ER at 35-36), and this debate will only benefit from Arizona's experience with its new requirement. Although Congress has not mandated E-Verify nationally, given the state and national interest in ensuring a lawful workforce and in an improved employee verification system, conflict preemption principles do not preclude Arizona from requiring E-Verify within its boundaries.

Plaintiffs also suggest that Arizona's requirement might strain the federal system, thus raising preemption concerns. The record does not establish that Arizona's requirement has in any way harmed the E-Verify program. In fact, the record suggests federal support for the increased use of E-Verify. (Supp. ER 36.) Plaintiffs' suggestion that the "state concedes" that Arizona's requirement "could strain the system" misconstrues the record below. (OB at 43.) For this proposition, they rely on a letter that Arizona Governor Napolitano sent to federal officials when she signed the Act in July 2007 to advise them of Arizona's new

requirement. Nothing in the record evidences any federal concern about Arizona's E-Verify requirement or any actual problems with the expansion of the E-Verify program as a result of Arizona's new law. To the contrary, the record only shows federal support for expanding the E-Verify program. (Supp. ER 16.) The concern that the increase in E-Verify use might burden federal authorities is also unwarranted because there is no nationwide cap on E-Verify participation and federal authorities have no control over the volume of participation nationally.

Finally, Plaintiffs assert that Arizona cannot require E-Verify because if every other state did so the system would be overburdened. (OB at 43.) The question, however, is whether requiring E-Verify creates an actual conflict with federal law or is an obstacle to achieving the goals of Congress. Because Congress's goal is to improve the verification system and ensure that workers are authorized to work in this country, Arizona's E-Verify requirement creates no conflict with and, in fact, supports federal law.[14]

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[14] Plaintiffs incorrectly argue that, despite the Act's severability clause, the Court cannot sever the verification statute or the sanctions statute if either is preempted. (OB at 44, n.10.) Arizona courts give effect to severability clauses whenever possible. *See Selective Life Ins. Co. v. Equitable Life Ins. Soc'y*, 101 Ariz. 594, 599, 422 P.2d 710, 715 (1967). Although the clause will not be given effect if the valid and invalid portions are "inextricably intertwined" and "so connected and interdependent in subject matter, meaning, and purpose" as to justify a conclusion that the legislature intended them as a whole and would not have enacted one without the other, *see Hudson v. Kelly*, 76 Ariz. 255, 274, 263 P.2d 362, 375 (1953), this limited exception does not apply here. The sanctions statute and the E-Verify requirement are not "inextricably intertwined." The E-Verify requirement

II. The Act Does Not Violate Plaintiffs' Procedural Due Process Rights.

Plaintiffs' due process claim cannot meet the heavy burden imposed upon a party mounting a facial challenge against a legislative enactment. Plaintiffs cannot prevail merely by conjuring one set of circumstances in which the Act could operate unconstitutionally—rather they must establish that in no circumstance could the Act be applied in a constitutional fashion. *See Washington State Grange v. Washington State Republican Party*, 128 S.Ct. at 1195 (declining to make a factual assumption about voter confusion when plaintiffs initiate facial challenge to election statute). The procedural protections provided in the Act and in Arizona's rules of civil procedure easily defeat any claim that the Act in all circumstances violates an employer's right to procedural due process.

A. Because the Act Requires Notice and a Hearing Before Permitting Any Sanctions Against Any Employer, It Complies with Due Process.

Procedural due process requires that a party have an opportunity to be heard "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)). With respect to notice, due process requires notice that is reasonably calculated

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works without employer sanctions, and the employer sanctions can function without requiring E-Verify. The best evidence of legislative intent is the language of the severability clause itself, which unambiguously directs that any enforceable provision of the Act should be preserved if another portion of the Act is unconstitutional. *See* 2007 Ariz. Sess. Laws Ch. 279, § 5.

under all of the circumstances to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). It also requires "a fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955).

There is no uniform approach to determining what procedures due process requires; rather, the Supreme Court has recognized that due process "is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* Accordingly, the Supreme Court established a balancing test for deciding what procedures are required – the three relevant factors to consider in a procedural due process analysis are: (1) the private interest affected by the action; (2) the risk of erroneous deprivations through the procedures and the value of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the administrative and fiscal business of additional or substitute procedural safeguards. *Id.* at 335.

In this case, Defendants acknowledge that an Arizona business license is a property interest. *See Comeau v. Ariz. State Bd. of Dental Exam's*, 196 Ariz. 102, 106, 993 P.2d 1066, 1070 (App. 1999) (finding that a business license is a property interest). Plaintiffs, however, cite no case that supports the proposition that

sanctions imposed against a license following a judicial proceeding like the one the Act requires violates due process.

Plaintiffs claim that the Act violates due process because it restricts the employer from putting forth evidence of an employee's work authorization. (OB at 54.) This misconstrues the statute and its due process implication. The argument centers on the language in A.R.S. § 23-212(H):

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

While the first sentence of A.R.S. § 23-212(H) directs a court to consider only the federal government's determination pursuant to 8 U.S.C. § 1373(c) when determining whether an employee is an unauthorized alien, the Court cannot analyze its significance in isolation but must read that sentence in context with the remainder of the section. The sentence immediately following states that "[t]he federal government's determination creates a rebuttable presumption of the employee's lawful status." A.R.S. § 23-212(H). By expressly authorizing rebuttal evidence on the issue of lawful status, the second sentence, seemingly contradicts the first sentence's restriction on the evidence that a superior court can consider. As the district court noted, this subsection requires statutory construction. (ER 44:23.)

In Arizona, a rebuttable presumption is exactly that–rebuttable. It may be overcome by evidence. *See, e.g., Barlage v. Valentine*, 210 Ariz. 270, 277, 110 P.3d 371, 378 (2005) (defendant allowed to put forth evidence to rebut the presumption that she was personally served with process); *Wallace Imports, Inc. v. Howe*, 138 Ariz. 217, 224-25, 673 P.2d 961, 968-69 (App. 1983) (may offer evidence to rebut presumption of proper title created by certificate of title). Thus, employers could offer relevant and admissible evidence to rebut any presumption attached to the federal government's determination of the employee's lawful status. To find otherwise, as Plaintiffs suggest, would result in impermissibly ignoring the entire sentence in the statute that creates the "rebuttable presumption." *See, e.g., Williams v. Thude*, 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997) ("Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial."[emphasis, internal quotations, and citation omitted]).

Moreover, as the district court noted, A.R.S. § 23-212(H) logically parallels A.R.S. § 23-212(B) of the Act, which provides that "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," and that an individual's status "shall be verified with the federal government pursuant to 8 U.S.C. § 1373(c)." Both provisions protect workers from being investigated directly by the state. (ER

45:25-27; 46:1.) Under Defendants' interpretation of the statute, the state must rely on information received under 8 U.S.C. § 1373(c) to establish an employee's status, but the employer may offer evidence to rebut the presumption created by the statute.

Looking to another subsection within the Act for interpretative guidance is consistent with commonly accepted statutory construction principles. After first considering the language of a statute, a court should evaluate context by considering both the statute in question and the "entire legislative scheme." *See Norgord v. State ex rel. Berning*, 201 Ariz. 228, 231, 33 P.3d 1166, 1169 (App. 2001). A court may determine the meaning of ambiguous words in a statute by considering other associated words or terms in the statute. *See id.* In addition, because this interpretation of the Act is sensible, fair, and upholds the constitutionality of the Act, the Court must prefer it to an interpretation that leads to a finding of unconstitutionality. *See Lake Havasu City v. Mohave County*, 138 Ariz. 552, 558, 675 P.2d 1371, 1377 (1983) (noting that if a statute is susceptible to two interpretations, one of which renders it unconstitutional, the court must adopt the interpretation that favors the statute's validity).[15]

[15] As discussed previously, contrary to Plaintiffs' arguments (OB at 58), nothing precludes state courts from making decisions that involve determining whether a person is an "unauthorized alien" or purposes of imposing license sanctions against an employer.

Applying accepted principles of statutory construction, A.R.S. § 23-212(H) requires that the state court look only to the federal government's determination of immigration status based on 8 U.S.C. § 1373(c) to evaluate if the state has made its prima facie case regarding an employee's lawful status and if the "rebuttable presumption" attaches to the employee's lawful status. The employer may then introduce rebuttal evidence for the court's consideration.[16] The district court recognized that this interpretation "provides the employer with a meaningful hearing on the subject of liability and avoids the constitutional issues posed by [Plaintiffs]." (ER 46:9-10). Because a valid, constitutional interpretation exists, Plaintiffs cannot prove, as they must on this facial challenge, that "no set of circumstances exists under which [the Act] would be valid." *See Salerno*, 481 U.S. at 745.[17]

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[16] The newly adopted Arizona Rule of Civil Procedure 65.2, expressly provides that the court may not order a license suspension or license revocation pursuant to A.R.S. § 23-212 without first conducting an evidentiary hearing, unless all parties waive the hearing. Ariz. R. Civ. P. 65.2(g). At the court hearing, a judge will consider arguments and evidence that go to essential elements of the Act. Court rules also provide for appeals, stays of court orders, special actions, and other procedures that give the parties to any dispute many opportunities to protect their interests.

[17] If the Court is inclined to accept Plaintiffs' statutory construction and procedural due process arguments, it should first certify the statutory construction question to the Arizona Supreme Court for an authoritative answer on the issue of the proper construction of A.R.S. § 23-212(H). *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997). Certification should not be necessary because

B. Even if a Court Adopted Plaintiffs' Restrictive Interpretation of A.R.S. § 23-212(H), the Act Survives a Facial Procedural Due Process Challenge.

The district court correctly found that, even if the federal determination under 8 U.S.C. § 1373(c) were binding on the court in a hearing under A.R.S. § 23-212(H), Plaintiffs cannot establish that the Act would operate in an unconstitutional manner in all conceivable circumstances. (ER 49.) Plaintiffs' due process challenge arises from an assumption that employers have no role or input in the federal determination that will be used in the state court action. This assumption is not necessarily true.

In the case of an employer that uses the E-Verify program as the Act requires, the employer will receive notice that the employee is either verified as authorized to work or the employer receives the tentative nonconfirmation concerning an employee's work authorization. (Supp. ER 58.) If the employer receives a tentative nonconfirmation, the employer then notifies the employee and provides the necessary information to contact the federal government to contest the nonconfirmation. (Supp. ER 59-69.) The employer can terminate an employee

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of the narrow focus of a facial challenge and the likelihood that the Arizona Supreme Court will have the opportunity to address any statutory construction issues in due course if injunctive relief is denied to the Plaintiffs in this case. If the Court intends to invalidate a portion of the law based on a disputed issue of statutory construction before such opportunity arises, however, the Arizona Supreme Court should be afforded a chance to address the issue. *Id. at* 75-79.

who expressly declines to rectify the issue with the federal government. (ER 305-306.) If the employee corrects the federal records, the federal determination introduced in court at a later hearing under A.R.S. § 23-212(H) should reflect the employee's authorization to work. If the federal government decides its initial determination under E-Verify was correct, it issues a final nonconfirmation to the employer. (Supp. ER 75-76.) The employer can then terminate the employee or retain the employee with notice to the federal government. (ER 305.) Arguably, either the employer or the employee could then exercise a right of review in federal court under 5 U.S.C. § 702 if they disagree with the final nonconfirmation.[18] In any event, the federal determination introduced in a hearing under A.R.S. § 23-212(H) may merely repeat the notice that the employer already received about the employee's lack of work authorization. The interactive process employed to determine the work authorization of an employee provides ample due process to the employer. Due process does not require the superior court to duplicate this procedure at a later hearing.

Plaintiffs assume that federal officials responding to a state's request under 8 U.S.C. § 1373(c) merely run a database search and report the result. (OB at 57.) But, they cannot establish that the process will work in this way. As the district

[18] 5 U.S.C. § 702 states, in part, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

court noted, the federal government could provide verification information to the state after receiving further information from the employer. (ER 49.) The state could also request a second verification based on information from an employer. Simply put, in this pre-enforcement facial challenge any examination of precisely how the § 1373(c) verification process will work in any particular case is entirely speculative. As the district court correctly concluded, "[t]he facial constitutionality of this process is not defeated by hypothetical situations that may result in no secondary verification taking place." (ER 49.) Accordingly, they cannot prove that in all circumstances this process will fail to meet the requirements of procedural due process.

In sum, a balance of all the *Mathews* factors in this facial challenge supports the conclusion that the Act's procedural protections fully satisfy due process. Even under their restrictive (and, Defendants believe, incorrect) interpretation of the statute, Plaintiffs cannot meet their burden of showing that no set of circumstances exists under which the Act would be valid. Therefore, their facial procedural due process claim fails. *See Salerno*, 481 U.S. at 745.[19]

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[19] Defendants note that the National Federation of Independent Business ("NFIB") Small Business Legal Center and the Associated Builders and Contractors raise in their amicus brief claims that the Act violates the Fourth Amendment and the Commerce Clause. The Plaintiffs failed to raise these arguments in the Opening Brief and thus amici improperly ask the Court to consider them on the basis of the amicus brief. NFIB Brief at 4. Plaintiffs waived their claims under the Fourth Amendment and the Commerce Clause by declining to incorporate them in the

III. The District Court Correctly Dismissed Claims against the State Defendants.

A. Plaintiffs Have No Justiciable Controversy Against the State Defendants.

Although Plaintiffs question the district court's decision to dismiss the claims against the State Defendants in *Contractors I and II*, the Court need not reach this issue because *Contractors II* presents a justiciable controversy against the county attorneys. Nevertheless, the District Court correctly concluded that it lacked subject matter jurisdiction over *Contractors I*.

Under Article III of the United States Constitution, the federal courts may only adjudicate a "case or controversy." *See, e.g., Allen v. Wright*, 468 U.S. 737, 750 (1984). Plaintiffs have the burden to establish that the federal court has jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). They must demonstrate three elements that constitute the "irreducible constitutional minimum" of Article III standing: (1) an injury-in-fact to a legally protected interest that is concrete and particularized or actual or imminent; (2) a causal connection between their injury and the conduct complained of; and (3) that it is likely, not merely speculative, that their injury will be redressed by a favorable

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Opening Brief and not adopting the arguments of the amici curiae. *See Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 862 (9th Cir. 1982). An amicus cannot raise a legal issue not raised by the parties. *United States v. Gementera*, 379 F.3d 596, 607-08 (9th Cir. 2004).

decision. *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). Moreover, the Plaintiffs must independently establish standing to challenge each provision of the Act because standing to challenge one provision of the Act does not entitle the Plaintiffs to challenge all of the other provisions. *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001) (citing *4805 Convoy, Inc v. San Diego*, 183 F.3d 1108, 1112-1113 (9th Cir. 1999)). Plaintiffs cannot demonstrate standing to sue the State Defendants because they fail to establish the required causal nexus between those Defendants and the alleged injury.[20]

To establish standing, "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In the context of suits seeking to enjoin enforcement of a state law by a state officer, "the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007); *see also Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004).

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[20] The standing analysis in the Opening Brief focuses on the Director of the Department of Revenue and the Attorney General, and it is to these arguments the Defendants respond. The same arguments herein apply to the Governor of Arizona (a party only in *Contractors* I) and the Registrar of Contractors (a party only in *Contractors* II).

The State Defendants do not cause the injury that the Plaintiffs allege arises from their use of the E-Verify program. Plaintiffs concede that their alleged injury arises solely from economic harm caused by participating in E-Verify and not from any threat of prosecution under the Act. (OB at 59.) Regarding the economic injury, the State Defendants have no authority to enforce the Act's requirement to use E-Verify. As stated above, the Act creates no enforcement mechanism to allow the state to directly compel employers to use the E-Verify program or sanction the failure to use it. The Supreme Court has recognized that "a justiciable controversy does not exist where 'compliance with (challenged) statutes is uncoerced by the risk of their enforcement.'" *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 507 (1972).

Moreover, to the extent a coercive effect on employers to use E-Verify might arise from the prospect of sanctions proceedings under A.R.S. § 23-212(D), only the county attorneys have the authority to commence an action against any potential violator of the Act. The State Defendants cannot exercise whatever coercive power the sanctions provision might afford. As the district court correctly stated, "the causation element of standing requires that the Attorney General have enough connection to [Appellants'] injury that a judgment against him will protect them from having to participate in E-Verify." (ER 116); *see also Wasden*, 376 F.3d at 919. Because the State Defendants have no power to prosecute violators of

the Act, this connection does not exist. A judgment against the State Defendants provides no redress that would preclude operation of the Act because the county attorneys can independently commence their own prosecution of violators and thereby enforce the Act's provisions. Accordingly, Plaintiffs fail to establish a causal connection between the State Defendants and the alleged injury arising from the Act as required by the principles of Article III standing.

Without supporting authority, Plaintiffs claim that the economic injury arising from the Act is "fairly traceable" to the State Defendants merely because they fulfill their statutory duties under the Act. (OB at 60.) Under their interpretation of the causation prong, any state officer with a role in implementation of the Act (not just enforcement) would be a "cause" of economic injury in the standing analysis. Courts, however, have not conducted the causation analysis in such broad terms with regard to state officers. The court must determine "whether there is the requisite causal connection between their responsibilities and any injury that the plaintiffs might suffer, such that relief against the defendants would provide redress." *Wasden*, 376 F.3d at 919. In this case, Plaintiffs rely on the Department of Revenue's notice about the Act and the Attorney General's authority to investigate complaints, noting a $100,000 appropriation to "enforce" the Act. (OB at 60.) Yet, these activities do not cause the injury of which Plaintiffs complain—the cost of registering for and using the E-

Verify program. The Department of Revenue notice merely outlined the requirements set forth in statute, without any indication or threat of enforcement if employers chose not to enroll in E-Verify. (ER 297-99.) It no more causes the Plaintiffs injury than would the publication of the statute books containing the Act by a legal publisher. The Attorney General investigates complaints of knowingly or intentionally hiring unauthorized aliens—not complaints that an employer failed to use E-Verify. A.R.S. § 23-212(B). The appropriation to the Attorney General for "enforcement" of the Act funds the execution of his investigative duties as well as his duty to maintain a database on his website of court orders issuing in cases initiated under the Act. A.R.S. § 23-212(G). The economic injury allegedly springing from the mandatory use of E-Verify is not "fairly traceable" to these activities by the State Defendants.

Plaintiffs' attempt to establish causation by alleging that "state officials' actions to coerce employers to use E-Verify" creates a diversion of resources also fails. (OB at 60.) As discussed above, none of the State Defendants has the ability to directly or indirectly coerce the employers to use E-Verify. Moreover, using diversion-of-resources analysis in this case is inappropriate. Plaintiffs rely on the test first articulated in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and further developed thereafter in the context of organizational standing in lawsuits under the Fair Housing Act. The *Havens* diversion-of-resources test requires a

plaintiff to allege "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources." *Id.* at 379. In the Fair Housing Act cases, plaintiffs generally point to a record of specific discrimination and allege how they expended resources to counteract the defendant's wrongful actions. *See id.; Smith v. Pacific Prop. and Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (noting that the complaint "pled with particularity two causes of action for violations of the FHAA at five Pacific Properties developments"). In this case, the State Defendants do not engage in any conduct that causes the alleged diversion of resources. The Act imposes the duty on employers to use E-Verify, but provides no authority to state officers to compel its use. Thus, although the Act might cause the economic injury, the State Defendants do not. Because the Plaintiffs cannot establish that the State Defendants cause the injury of which they complain, the Court properly dismissed the claims in *Contractors I.*

B. The Eleventh Amendment Bars Plaintiffs' Claims Against State Officers.

The causation and redressability analysis of standing is similar to the analysis under the Eleventh Amendment, which prohibits suit against a state by a citizen of that state or another state in federal court, but permits a suit against a state official to enjoin the enforcement of an allegedly unconstitutional law. *Ex parte Young*, 209 U.S. 123, 157 (1908). In such a suit, "it is plain that such officer

must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Id.* Because none of the State Defendants can enforce the E-Verify requirements, they lack the requisite connection to enforcement of that portion of the Act. Accordingly, the Eleventh Amendment bars the claims against the State Defendants based on the alleged unconstitutionality of the E-Verify requirements.

Similarly, the State Defendants' lack of enforcement authority under the sanctions statute, A.R.S. § 23-212, raises Eleventh Amendment issues. For an action to proceed against a state officer in federal court, "there must be a connection between the official sued and enforcement of the allegedly unconstitutional statute, and there must be a threat of enforcement." *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992). Additionally, "[t]his connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Planned Parenthood of Idaho*, 376 F.3d at 919 (citation omitted); *see also Long*, 961 F.2d at 152. The sole responsibility of the Director of the Department of Revenue under the Act was to dispatch a notice to all employers regarding the effective date of the Act and employers' obligations, which it has done. (ER 297-99.) The statute grants only investigative powers to the Attorney

General, and reserves to the county attorneys the power to commence and prosecute an action for a 00violation of the Act. A.R.S. § 23-212(B), (C), (D). Given this minimal role in the statutory scheme, Plaintiffs cannot establish the "requisite enforcement connection" between the State Defendants and the sanctions provision of the Act. *See Nat'l Audubon Society, Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (holding that Eleventh Amendment barred suit against certain state officers because of the lack of requisite enforcement connection to the challenged statute).[21]

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's decision rejecting Plaintiffs' constitutional challenge.

Respectfully submitted this 29th day of April, 2008.

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[21] The Attorney General notes that, even though he is not a proper Defendant in this action under Article III and the Eleventh Amendment, he has a role in this case defending the constitutionality of the Arizona law at issue. His proper role is as an intervenor under Fed.R.Civ.Proc. 5.1(c) for the limited purpose of defending the constitutionality of the Act.

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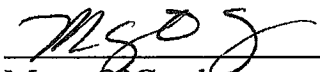
STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees state that they are not aware of any related cases pending in the Ninth Circuit.

Dated this 29th day of April, 2008.



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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,724 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 29th day of April, 2008.

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