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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA CONTRACTORS ASSOCIATION, INC., *et al.*,	)
	)
Plaintiffs/Appellants,	)
	)
vs.	)
	)
CRISS CANDELARIA, *et al.*,	)
	)
Defendants/Appellees.	)
	)
	)
And consolidated cases.	)
	)

PETITION FOR REHEARING AND REHEARING EN BANC

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STATEMENT

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

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

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

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

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

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

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

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

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

There is no question that Congress intended that E-Verify be voluntary. The relevant section of IIRIRA is entitled "*Voluntary* election to participate in a pilot program." IIRIRA, §402 (emphasis added). Congress repeatedly emphasized the voluntary nature of the program. Section 402(a) is entitled "*Voluntary Election*," and provides that employers "*may elect* to participate in that pilot program," but the government "*may not require*" employers to do so. (Emphases added.) Congress also required the government in two separate provisions to publicize or provide information about "the voluntary nature" of the program. IIRIRA, §§402(d)(2), (3)(A). Congress' list of certain "Select Entities Required to Participate" does not include employers covered by Arizona's Act. IIRIRA, §402(e). Moreover, Congress has revisited E-Verify since 1996 when IIRIRA was enacted and repeatedly chosen to keep participation voluntary. Basic Pilot Extension Act of 2001, Pub. L. No. 107-128, 115 Stat. 2407 (2002); Basic

Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 (2003).[1]

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

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

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[1] Congress has repeatedly declined to enact legislation to make the program mandatory, including this year. *E.g.*, H.R. 4437, Title VII, 109th Cong. (2005); S. 2611, Title III, 109th Cong. (2006); S. 1348, Title III, 110th Cong. (2007); H.R. 19, 110th Cong. (2007); H.R. 6789, Title VI, 110th Cong. (2008).

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

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

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

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

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

A. The Panel Failed To Address Conflict Preemption

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

The panel gave no explanation for its failure to address a major claim, and Supreme Court and Ninth Circuit authority precludes disregarding implied preemption after addressing the separate issue of express preemption. What "must be implied is of no less force than that which is expressed." *Crosby*, 530 U.S. at 373 (punctuation omitted). Even if a state law fits within a clause that saves it from express preemption, that "does *not* bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869 (emphasis in original); *see also Leipart*, 234 F.3d at 1069 (state common law action fell within savings clauses to express preemption provision, but "the question remains, . . . whether such common-law requirements conflict with the statute considered as a whole").

IRCA struck a careful compromise among competing goals. *See Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd on*

other grounds, 502 U.S. 183 (1991). Congress aimed to deter illegal immigration. But Congress wanted to minimize the burden on employers. *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991). IRCA also addressed concerns that employers might, out of fear of sanctions, discriminate against lawfully authorized employees or job applicants who looked or sounded foreign. *See id.* at 552, 554; H.R. Rep. No. 99-682(I) at 68-69 (1986), 1986 USCCAN 5649, 5672-73.

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

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

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

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

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

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

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

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

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

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

The Supreme Court has held that a state cannot enact a sanctions scheme that is dramatically harsher than the carefully drawn federal system. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003) (state may not "use an iron fist where the [federal government] has consistently chosen kid gloves"); *Crosby*, 530 U.S. at 380 ("the inconsistency of sanctions . . . undermines the congressional calibration of force"). Nor can the panel's approach be reconciled with this Court's recent recognition that an expansion of the "scope of liability" faced by employers can upset the "delicat[e] balanc[e]" between "preventing unauthorized alien employment" and "avoiding discrimination." *Aramark Facility Servs. v. SEIU Local 1877*, 530 F.3d 817, 825 (9th Cir. 2008) (internal quotation marks omitted).

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

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

B. The Panel Overlooked The Federal Nature Of Immigrant Employment

The panel's mistaken preemption analysis and its further error in applying a presumption against preemption (Slip Op. at 13072-74) are based on a failure to grapple with the historic sea change enacted by IRCA, which transformed immigration law into a comprehensive *federal* regulation of immigrant employment. Before IRCA, regulation of immigrant employment was left to the states because Congress had *not* enacted "uniform national rules." *De Canas v. Bica*, 424 U.S. 351, 356, 361 n.9 (1976). But that critical predicate on which *De Canas* turned has not been true since 1986. The uniform national rules that Congress enacted in IRCA definitively moved such regulation to the federal realm, by "forcefully ma[king] combating the employment of illegal aliens *central to [t]he policy of immigration law*." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (emphasis added; internal quotation marks omitted).[5]

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

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

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

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

IRCA expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. §1324a(h)(2). The panel concluded that Arizona's employer sanctions scheme falls within the parenthetical savings clause for licensing laws because the Act "provides for the suspension of employers' licenses to do business in the state." Slip Op. at 13074. This ignores what Congress tried to accomplish and undermines the congressional policy of uniformity.

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

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

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

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

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

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

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

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

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

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

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

In permitting this result, the panel neglected to consider Supreme Court cases holding that express preemption provisions invalidate laws that threaten such patchwork regulation. *See, e.g., Rowe v. New Hampshire Motor Trans. Ass'n*, 128 S.Ct. 989, 996 (2008) (state law that would "easily lead to a patchwork of state service-determining laws, rules, and regulations" expressly preempted).

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

CONCLUSION

For the foregoing reasons, this case should be reheard.

Dated: October 1, 2008

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CERTIFICATE OF COMPLIANCE

I certify that this petition for rehearing and rehearing en banc is proportionately spaced in Times New Roman font, 14 point type, and that this brief contains 4,193 words, exclusive of the table of contents, table of authorities, certificate of compliance, and proof of service. This certification is based upon the word count of the word processing system used in preparing this brief.

Dated: October 1, 2008

By: _____
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PROOF SERVICE

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

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The Document(s) were served by the following means:

By United States Mail. I served the documents by enclosing them in an envelope and placing the envelope for collection and mailing following our ordinary business practices.

I declare under penalty of perjury under laws of the State of California that the foregoing is true and correct.

Date: October 1, 2008

Sally Mendez