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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs/Appellants,

vs.

CRISS CANDELARIA, *et al.*,

Defendants/Appellees.

And consolidated cases.

PLAINTIFFS/APPELLANTS' CONSOLIDATED REPLY BRIEF

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INTRODUCTION

Arizona has enacted a vast employer sanctions regime subjecting every employer in the state to a new set of statutes, procedures, and adjudications governing immigrant employment. A critical part of Arizona's scheme is the requirement that all Arizona employers participate in the federal E-Verify program that Congress deliberately made voluntary.

Arizona's Act seeks to override Congress' uniform and comprehensive federal system in favor of the state's own idiosyncratic mandates, procedures, investigatory standards, adjudications, and penalties. Arizona acknowledges that it has acted out of frustration with federal law. However understandable that frustration may be, Arizona's substitute system is preempted by federal law.

First, Defendants try to avoid Congress' express preemption provision by relying on an overly broad and unsustainable reading of the parenthetical savings clause. Defendants' construction would eviscerate the express preemption provision by allowing Arizona – as well as every other state and locality – to enact its own employer sanctions provisions through the artifice of characterizing them as "license"-related. In contrast, Plaintiffs give effect to both the preemption provision and the savings clause by allowing states to impose an additional sanction through a *bona fide* licensing law after a violation is found under *federal* procedures.

Defendants' argument turns the preemption provision on its head; contradicts the language and purpose of the Immigration Reform and Control Act

of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, 8 U.S.C. §§1324a-1324b; disregards Supreme Court precedent; and ignores the fundamental change in the federal regulation of immigrant employment that IRCA enacted. Defendants place critical reliance on *De Canas v. Bica*, 424 U.S. 351 (1976). But IRCA fundamentally changed federal immigration law: Employment of unauthorized workers, a matter of "peripheral concern" at the time of *De Canas*, *id.* at 360, subsequently became "central to the policy of immigration law." *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002) (punctuation omitted). Defendants repeatedly rely on *De Canas*, but never grapple with the fundamental change IRCA created.

Second, wholly apart from whether Arizona can shoehorn its pervasive scheme into the parenthetical savings clause, *conflict* preemption requires a separate inquiry based on a careful assessment of whether state law stands as an obstacle to the federal system.

Defendants repeatedly, and incorrectly, retreat to the savings clause to justify irremediable conflicts. But this approach erroneously conflates the two preemption inquiries. As the Supreme Court has stated, "[n]othing in the language of the saving clause suggests an intent to save state[laws] that conflict with" federal law. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 869 (2000). The savings clause does not alter the conflict preemption analysis. *Id.* at 870-74.

With regard to E-Verify, Defendants entirely ignore the language of the federal statute, which explicitly sets forth a *voluntary* program. Arizona's

mandatory duty to enroll in E-Verify squarely conflicts with what Congress wanted to accomplish. The Act's employer sanctions provisions also conflict with federal law by bypassing and contradicting the federal system for determining and adjudicating violations, imposing standards and criteria for triggering an investigation and prosecution that diverge from federal law, undermining defenses that an employer is entitled to assert under IRCA, and imposing penalties that radically exceed federal law. The Act destroys the balance of incentives, protections, procedures, and penalties that Congress carefully crafted to create a uniform federal employer sanctions system, and therefore is conflict preempted.[1]

ARGUMENT

I. THE ARIZONA ACT IS PREEMPTED

A. IRCA's Savings Clause Cannot Save The Arizona Act From Express Preemption

Defendants do not deny that Arizona's Act must fall within IRCA's savings clause for "licensing and similar laws" to avoid express preemption under 8 U.S.C.

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[1] On May 1, 2008, the Legal Arizona Workers Act was amended. 2008 Ariz. Sess. Laws Ch. 152 (H.B. 2745) (attached as Appendix A). The Act remains the same in all relevant respects. The employer sanctions regime is now in two sections: Ariz. Rev. Stat. §23-212 (knowing employment of unauthorized workers) and Ariz. Rev. Stat. §23-212.01 (intentional employment of unauthorized workers). But the responsibilities of the Attorney General and County Attorneys and the sanctions scheme remain virtually the same. The Act also still requires employers to use E-Verify, and provides a defense to sanctions based on such use. H.B. 2745, §§4-6 (amending Ariz. Rev. Stat. §§23-212(I), 23-212.01(I), 23-214(A)). Because prior briefs cite to the July 2, 2007 version of the Act, Appendix B enumerates the parallel citations to the newly-amended Act.

§1324a(h)(2). Nothing in the savings clause, however, empowers states to do what the Act attempts: create a separate adjudicatory and enforcement scheme for deciding who is and is not an unauthorized alien. Moreover, Defendants do not and cannot dispute the fundamental points that defeat their overly broad interpretation of the savings clause, and that compel the conclusion that the Arizona Act is expressly preempted. *See* Opening Br. 16-18.

- IRCA is "a comprehensive scheme prohibiting the employment of unauthorized aliens in the United States" that "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law.'" *Hoffman Plastic*, 535 U.S. at 147.
- IRCA's employment regulations are "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging unauthorized employment with measures to protect those who might be adversely affected." *Nat'l Ctr. For Immigrants' Rights, Inc. v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991).
- Congress expressly stated its intent that IRCA's scheme for regulating the employment of unauthorized aliens (as well as other immigration laws) "be enforced vigorously and *uniformly*." IRCA, §115 (emphasis added).

To implement Congress' desire for uniformity and to preserve its comprehensive system and the careful regulatory balance it has struck, the savings

clause permits states to impose sanctions (1) after the *federal* process has found a violation; and (2) under a genuine licensing law. Opening Br. 15-34. Defendants' argument to the contrary is unsupported by the legislative language, and twists the savings clause out of its historical and statutory context.[2]

1. The Arizona Act Impermissibly Fails To Require A Federal IRCA Finding

Plaintiffs have demonstrated that state schemes for determining whether an employer has hired an unauthorized alien and imposing sanctions must rely on a federal IRCA finding against that employer. Opening Br. 23-28. Defendants' contrary conclusion rips *De Canas* from its historical context to argue that employment of unauthorized aliens is currently "in the 'mainstream of [state] police power.'" Opp. Br. 16. On that basis, Defendants seek an "'assumption'" of non-preemption (Opp. Br. 18) – what the district court called a "presumption against preemption." ER 33:22-23. But as Plaintiffs have demonstrated (Opening Br. 20-21), and Defendants ignore, *De Canas* was decided ten years before Congress enacted IRCA, when federal immigration law reflected only a "a peripheral concern with employment of illegal entrants." 424 U.S. at 360. *De*

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[2] The distinction between facial and as-applied challenges that Defendants raise (*e.g.*, Opp. Br. 26 n.9) is not implicated here because the issue is whether the Arizona Act is preempted on categorical grounds – namely, that the Act does not come within the savings clause, and is in direct conflict with IRCA's purposes – not on grounds that depend on a particular set of facts. *See Green Mountain R.R Corp. v. Vermont*, 404 F.3d 638, 644 (2d Cir. 2005) ("'The facial/as-applied distinction would be relevant only if we might find some applications of the statute preempted and others not.'").

Canas concluded that, in the absence of congressional intervention at the time the case was decided, regulation was left for the states. *Id.* at 356, 361 n.9. But Congress subsequently enacted uniform national rules in IRCA that moved the regulation of the employment of unauthorized aliens to the forefront of federal immigration law and out of the realm of the traditional state police power. *See* Opening Br. 13, 18, 21 (citing *Hoffman Plastic*, 535 U.S. at 147).[3] The savings clause must be read in light of the sea change that IRCA caused in the federal-state balance.

Defendants never seriously address IRCA as a whole; its detailed procedures, standards, and penalties; or, in particular, the careful process Congress established in 8 U.S.C. §1324a(e) for finding an employer knowingly employed an unauthorized alien. Instead, Defendants rely on the seven words of the parenthetical savings clause without any explanation why, in light of Congress' manifest intent to create a uniform system, Congress would use a means so indirect as a brief "licensing" savings clause to authorize completely divergent

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[3] Defendants characterize IRCA as recognizing the states' interest in an authorized workforce. Opp. Br. 19, 21. But IRCA expressly *took* from states almost all of their earlier authority to regulate employment of unauthorized aliens. 8 U.S.C. §1324a(h)(2). Defendants also exaggerate the local interest in regulating the employment of unauthorized aliens that existed pre-IRCA. A report the district court cited (ER 19:22-24) concluded that only one employer had ever been sanctioned by any state under a state employer sanctions statute. U.S. Immigration Policy and the National Interest: Staff Report of the Select Commission on Immigration and Refugee Policy 565-66 (1981) (noting one Kansas employer was fined $250).

adjudicatory systems that upset IRCA's carefully balanced regulatory regime. *See* Opening Br. 23-25; *see also Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 871 (9th Cir. 1981) (courts should not "operate under an artificially induced sense of amnesia about the purpose of legislation").[4] Indeed, *United States v. Locke* commands that in the face of a "careful regulatory scheme" – like IRCA's – courts should "decline to give" the sort of "broad effect" to a savings clause that Defendants now advance. 529 U.S. 89, 106 (2000).[5]

Moreover, Defendants do not and cannot dispute that their expansive reading of the savings clause would invite every state, city, and town to create its own unique process for determining who is and is not an unauthorized alien.

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[4] When Congress intends for states to have parallel adjudicative and enforcement authority in an area subject to comprehensive federal regulation, it knows how to say so, employing language far more explicit than IRCA's savings clause. Typically, Congress uses a formulation as in the Safe Water Drinking Act: "Nothing in this subchapter shall diminish any authority of a State or political subdivision to adopt or enforce any law or regulation respecting drinking water regulations or public water systems." 42 U.S.C. §300g-3(e). Other examples throughout the United States Code use the same or similar language to expressly authorize parallel state authority in areas of concurrent federal regulation. *See, e.g.*, 7 U.S.C. §3812; 15 U.S.C. §6313; 42 U.S.C. §2000e-7; 47 U.S.C. §551(g). IRCA contains no such language.

[5] Defendants try to distinguish *Locke* on the ground that it "interpreted a savings clause . . . consistent[ly] with the 'settled division of authority' between state and federal control" that had historically existed. Opp. Br. 21. But the critical point is that courts read savings clauses so as not to undermine the regulatory scheme. In this case, Congress exercised its power over immigration and commerce to enact a division of authority under IRCA that compels a narrow reading of the savings clause.

Opening Br. 26-28; Brief of *Amici Curiae* State Chambers of Commerce 5-9. That Balkanized approach to immigration policy cannot be reconciled with Congress' intent, as reflected in Section 115 of IRCA, that the immigration laws be uniformly enforced, and Congress' careful design of the federal system and procedures through which that uniformity should be achieved.[6]

The House Judiciary Committee Report on IRCA confirms that states or localities may only levy sanctions against "any person who has been found to have violated the sanctions provisions *in this legislation*." H.R. Conf. Rep. No. 99-682(I) at 58 (1986), 1986 USCCAN 5649, 5662 (emphasis added); *see also* Opening Br. 32-33.[7] Defendants refuse to concede that Congress intended a finding of an IRCA violation to be a prerequisite for state sanctions, relying instead on the final sentence of the paragraph in the Report. *See* Opp. Br. 23. But that sentence merely clarifies that states may enact licensing schemes that contain prohibitions on certain activity.

Defendants also miss the point of the Agricultural Worker Protection Act ("AWPA") in arguing that IRCA's amendments to AWPA "do not support the

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[6] Contrary to Defendants' suggestion (Opp. Br. 21), *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), does not minimize the federal interest in uniformity. That case found that the federal interest in uniformity did not bar state law when, unlike here, the relevant federal agency had expressly denied that its regulatory conduct should have any pre-emptive effect. *See id.* at 68-70.

[7] The Court can consult IRCA's legislative history to determine Congress' intent. *See Dent v. Cox Communications Las Vegas, Inc.*, 502 F.3d 1141, 1145 (9th Cir. 2007).

conclusion that Congress intended to broadly preempt the states' ability to revoke or suspend licenses." Opp. Br. 24. Plaintiffs do not contend that *all* state licensing sanctions are preempted. Rather, IRCA's amendments to AWPA confirm that Congress intended to require a federal violation under IRCA as a predicate to any state licensing sanction. *See* Opening Br. 30-32. Nor can Defendants draw support from AWPA's provision indicating that compliance "shall not excuse any person from compliance with *appropriate* State law and regulation." 29 U.S.C. §1871 (emphasis added). *See* Opp. Br. 24. The critical question is what constitutes "appropriate" state law. The only "appropriate" state laws in this area impose sanctions after a federal finding of an IRCA violation has been made.

2. The Arizona Act Does Not Constitute A Permissible "Licensing" Law

The Arizona Act is not a "licensing" or "similar" law within the meaning of the savings clause. Opening Br. 28-30. Defendants state conclusorily that "[t]he sanctions in the statute . . . are against business licenses as defined in the Act. For that reason, the sanctions fall well within the savings clause." Opp. Br. 24-25. But Congress referred specifically to "licensing and similar laws," not broadly to any employer sanctions law that includes a sanction against what the state chooses to call "licenses." *See* Opening Br. 28-30, 33. Neither IRCA as a whole nor any other evidence of congressional intent supports Defendants' conclusion. The savings clause does not encompass broad schemes of general applicability that

threaten to nullify instruments, such as articles of incorporation, that are not considered "licenses" in any other context.[8]

Defendants' view would allow states and localities to enact any parochial scheme so long as it invokes the word "license." This approach renders the express preemption provision a nullity. Plaintiffs, in contrast, give effect to the preemption provision and savings clause by allowing an exception to IRCA's prohibition on state sanctions for laws that impose a *bona fide* licensing sanction after a federal IRCA finding.

B. The Arizona Act Is Conflict Preempted

Wholly apart from whether the Arizona Act is expressly preempted, conflict preemption requires a separate and independent inquiry that compels invalidation of both the E-Verify requirement and the employer sanctions provisions.

1. The E-Verify Mandate Conflicts With Federal Law

Congress created (and has maintained) a *voluntary* E-Verify program that Arizona seeks to make mandatory. Defendants have no response to the unequivocal language of the federal statute establishing E-Verify, including that "any person or other entity that conducts any hiring . . . *may elect* to participate in

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[8] Defendants miss the point in criticizing Plaintiffs for pointing out that Black's Law Dictionary defines "licensing" as "[a] governmental body's process of issuing a license." Opening Br. 30; Opp. Br. 26. The meaning of "licensing" in the particular context of IRCA is not an issue that can be resolved by general dictionary definitions. That the district court relied on the definition of "license" when there is a contrary definition of "licensing" simply reinforces that Plaintiffs' approach to analyzing the savings clause is correct.

[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) (emphasis added). *See* Opening Br. 39; Brief of *Amici Curiae* State Chambers of Commerce 20-21. Defendants' arguments that the Act's E-Verify requirement is not preempted ignore the express language of the federal E-Verify statute and well-established preemption principles.

Defendants assert that "nothing in federal law prohibits a state from requiring employers" to use E-Verify. Opp. Br. 38. But "conflict preemption . . . 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); *see also* Opening Br. 41-42.

Defendants' arguments that the E-Verify requirement is saved from preemption because it will advance federal goals of reducing unauthorized employment and improving the verification system (Opp. Br. 38, 40), or address the lack of employer participation in the program (Opp. Br. 39-40), are equally unavailing. A state law that "interferes with the methods by which [a] federal statute was designed to reach [its] goal" is preempted. *Int'l Paper Co. v. Ouelette*, 479 U.S. 481, 494 (1987); *see also Public Util. Dist. No. 1 of Grays Harbor County Wash. v. IdaCorp Inc.*, 379 F.3d 641, 650 (9th Cir. 2004). "[T]he fact of a common end hardly neutralizes conflicting means." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425 (2003) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000)). In particular, the Supreme Court has held that

when the federal government chooses to phase-in a program gradually and provide users a choice of methods, a state law that requires one particular method "more . . . and . . . sooner" than does federal law is conflict preempted. *Geier*, 529 U.S. at 874-75; *see also* Opening Br. 36-37, 40-41, 53.

That is exactly the case here. Congress unequivocally and expressly allowed employers to *elect* whether to use E-Verify.

Further, under Defendants' view of preemption, each of the 50 states could mandate use of E-Verify, thereby turning the voluntary federal scheme – the method chosen by Congress – into a *de facto* compulsory regime. Defendants ignore (Opp. Br. 41) that conflict preemption exists when similar state or local laws would collectively defeat Congress' purpose. *See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (finding preemption where "prospect of all 50 States establishing similar" laws would pose "substantial threat" to federal objectives); Opening Br. 43-44.

Defendants do not dispute the significant problems with E-Verify. *See* Opening Br. 42-43. Defendants dismiss these flaws as "policy arguments." Opp. Br. 40. But Congress has chosen to keep E-Verify voluntary. Opening Br. 39-40.[9] Precisely because of this "policy" choice, Arizona cannot decide that employers

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[9] It is immaterial that DHS supports expanded use of E-Verify. *See* Opp. Br. 39, 40. Only *Congress* has the authority to mandate participation in E-Verify, and Congress has repeatedly rejected legislation compelling the program's use. Opening Br. 39-40 & n.8. Defendants also erroneously equate DHS support for expanded E-Verify use with an "agency interpretation" of the statute. Opp. Br. 39. No such interpretation has been issued by DHS or any other agency.

need E-Verify "more . . . and . . . sooner" than Congress determined. *Geier*, 529 U.S. at 874. The Supremacy Clause does not permit Arizona to contradict Congress' considered judgment simply out of a belief that the policy "debate will only benefit from Arizona's experience." Opp. Br. 40.[10]

2. The Employer Sanctions Scheme Conflicts With The Comprehensive Federal System

Defendants do not dispute that Plaintiffs have demonstrated a number of significant differences between the Act's employer sanctions provisions and federal law. Opening Br. 44-52. Defendants' primary response is reliance on IRCA's parenthetical savings clause to suggest that the Act can only be conflict preempted if IRCA *expressly* bars the Act's divergent provisions.[11]

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[10] Because the E-Verify mandate is preempted, the entire Arizona Act falls. The district court correctly found that "everything" in the Act – "effective deterrence, fair notice, opportunity to avoid sanctions, and under one view . . . what is necessary [for due process]" – hangs on the E-Verify requirement. ER 58:14-18; *see also* Opening Br. 44 n.10. Defendants state conclusorily that the "sanctions statute and the E-Verify requirement are not 'inextricably intertwined.'" Opp. Br. 41 n.14. To the contrary, as the district court recognized, the E-Verify requirement imbues every aspect of the Act's sanctions scheme.

[11] *E.g.*, Opp. Br. 29 ("Congress did not establish procedural requirements for states to follow when imposing sanctions under 8 U.S.C. § 1324a(h)(2)."); *id.* 30-31 ("particularly where Congress specifically preserved state authority to impose sanctions through state licensing laws . . . the possibility of different outcomes does not mean state action is preempted"); *id.* 32 ("the Act's serious sanctions" do not conflict "because IRCA explicitly preserved state authority"); *id.* 35 ("Arizona's statute supports [IRCA's] purpose and does so in a manner that is consistent with the authority Congress explicitly preserved for states in section 1324a(h)(2).").

But conflict preemption applies independently of express preemption. *See supra* at 11; *Int'l Paper Co.*, 479 U.S. at 493. Further, the savings clause relates only to express preemption, and does not suggest any "intent to save state [laws] that conflict with" federal law, "does *not* bar" the application of ordinary conflict preemption principles, and does not impose any special burden on a plaintiff asserting conflict preemption. *Geier*, 529 U.S. at 869, 870-74; *accord Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063, 1069 (9th Cir. 2000); *see also* Opening Br. 35-36. Under the governing conflict preemption standard, the Court is obliged, regardless of its reading of 8 U.S.C. §1324a(h)(2), to decide whether the Act "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Geier*, 529 U.S. at 873; *see also* Opening Br. 36-37. Defendants fail to acknowledge, apply, or distinguish this critically important principle.

Further, although acknowledging the multiple conflicts Plaintiffs identify, Defendants argue that Arizona's Act is not preempted because it shares one of IRCA's purposes – reducing unauthorized employment. Opp. Br. 35. But this single shared purpose does not excuse Arizona's divergent scheme.

First, as Plaintiffs have demonstrated, IRCA sought to balance a reduction in unauthorized employment with other important and competing purposes, including minimizing the burden on businesses and preventing discrimination against authorized employees and job applicants. *See* Opening Br. 16-18. The Act's emphasis on just one of several congressional purposes at the expense of

others demonstrates conflict, not harmony, with Congress' balanced system. *See* Opening Br. 51.[12]

Second, common goals do not save a state statute that conflicts with Congress' chosen means. *See supra* at 11; Opening Br. 36-38. As Plaintiffs have explained (Opening Br. 6-8, 16-18), Congress carefully chose the features of the federal employer sanctions system to balance the multiple objectives that it sought to achieve. The Arizona Act runs roughshod over these important choices by creating an entirely separate and divergent adjudicative system from the one Congress specified, discarding the procedural protections that Congress provided to employers and employees, drastically increasing the severity of sanctions without protecting against the resulting discrimination, and effectively eliminating the I-9 safe harbor. Opening Br. 44-52.

Defendants confirm several of these serious conflicts. They acknowledge, for example, that "a state court judge might reach a different conclusion than a federal administrative law judge concerning whether an employer knowingly employed unauthorized aliens." Opp. Br. 30. Defendants also acknowledge that

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[12] Defendants suggest that state employer sanctions that "track" IRCA or impose no new obligations are not conflict preempted. Opp. Br. 35 & n.13. This does not aid Defendants' argument, as Arizona's Act does not "track" IRCA, but imposes entirely new sanctions and procedural requirements. Opening Br. 44-53.

the Act's severe sanctions are not counterbalanced by any new protections against discrimination. Opp. Br. 33-34.[13]

Defendants' few criticisms of the conflicts Plaintiffs identify are misplaced. Defendants rely on the existence of the 8 U.S.C. §1373(c) process (Opp. Br. 31), even though it is designed for inquiries about "citizenship or immigration status," which is distinct from employment authorization. Opening Br. 46 & n.11. Defendants have no response to Plaintiffs' showing that, under federal law, IRCA – not §1373(c) – determines whether an employer has knowingly employed an unauthorized worker. Opening Br. 46. Section 1373(c) does not set forth or envision *any* adjudicative procedure, much less one that could substitute for the elaborate procedure that Congress created in IRCA.[14] Moreover, under Defendants' construction of the Act, a state court could disagree with any §1373(c) response, which would necessarily provide for non-uniform results. *See* Opp. Br. 30-31, 47.

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[13] As amended, the Act prohibits investigation of complaints "based solely on race, color, or national origin." Ariz. Rev. Stat. §§23-212(B), 23-212.01(B). This amendment does not cure the conflict. IRCA prohibits discrimination by employers. 8 U.S.C. §1324b. The amendment addresses only discrimination by complainants, not employers.

[14] Defendants claim that "Plaintiffs incorrectly assume . . . that the information received under 8 U.S.C. §1373(c) will not include information necessary to determine work authorization." Opp. Br. 31 n.10. Plaintiffs make no such assumption. Whatever information §1373(c) provides, mere information cannot substitute for an IRCA adjudication.

Defendants label as "speculation" (Opp. Br. 34 n.12) Plaintiffs' observation that the Act effectively deprives employers of the I-9 affirmative defense because federal law prohibits use of I-9 forms and associated documents "for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of title 18 [of the United States Code]." 8 U.S.C. § 1324a(b)(5). But defending an action under Arizona's Act does not constitute enforcement of any provision of federal law.[15] Nor is there any logical or statutory basis for Defendants' conjecture that an employer could prove I-9 compliance "through some other type of evidence." Opp. Br. 34 n.12.[16]

The entire purpose of the Act is to correct what Arizona views as Congress' errors or failures by imposing a different, conflicting sanctions scheme on Arizona's employers. Opening Br. 10, 49 (quoting Governor). Arizona may not act in derogation of the uniform federal system because the state is dissatisfied or

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[15] The recent clarification that employers will not lose their supposed I-9 defense for "accidental technical or procedural failure" does not address the state's inability to create such a defense in the first place. *See* H.B. 2745, §§4, 5 (amending Ariz. Rev. Stat. §§23-212(J), 23-212.01(J)).

[16] *Incalza v. Fendi North America, Inc.*, 479 F.3d 1005 (9th Cir. 2007), does not help Defendants. *See* Opp. Br. 16. That case considered whether IRCA excused a business from complying with generally applicable California employment law in particular circumstances. The potential for conflict in this case, where Arizona has set out to create a separate state scheme addressing a central aspect of federal immigration law, is much greater. Moreover, in *Incalza*, the Court found that the alleged incompatibility between state law and IRCA simply did not exist, 479 F.3d at 1010-13, whereas in this case Defendants have acknowledged a number of differences between state and federal law.

frustrated with Congress' choices. The Supremacy Clause forbids such unilateral action.

II. THE ARIZONA ACT VIOLATES DUE PROCESS

Defendants concede that a license is a property interest that cannot be suspended or revoked without due process. Opp. Br. 43. Their argument that the Act satisfies this requirement founders because employers cannot present any evidence regarding their employees' work authorization status: "On determining whether an employee is an unauthorized alien, *the court shall consider only the federal government's determination pursuant to 8 United States Code section 1373(c).*" Ariz. Rev. Stat. §§23-212(H), 23-212.01(H) (emphasis added).

Defendants attempt to elide this statutory directive and the resulting due process violation by suggesting that the sentence that follows this prohibition transforms the §1373(c) response to a mere "rebuttable presumption." Opp. Br. 44-47. Defendants' interpretation of the Act is incorrect. Opening Br. 55-56. Arizona law requires courts to "give effect to every provision in the statute . . . [and] interpret the statute so that no provision is rendered meaningless." *Mejak v. Granville*, 136 P.3d 874, 876 (Ariz. 2006).[17] Plaintiffs' interpretation of §§23-212(H) and 23-212.01(H) gives effect to both sentences by interpreting the

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[17] The principle that courts should prefer a constitutional interpretation of a statute over an unconstitutional one (Opp. Br. 46) does not permit adopting Defendants' construction. That rule allows the Court to decide between two permissible constructions. But Defendants ask the Court, in effect, to excise the first sentence from §§23-212(H) and 23-212.01(H).

"rebuttable presumption" language to mean that Arizona courts may require authentication of the §1373(c) document. Defendants' interpretation entirely ignores the Act's express command that "the court shall consider only the federal government's determination" under §1373(c).

Further, Defendants' attempt to explain their reading makes no sense. They imply that §§23-212(H) and 23-212.01(H) concern whether state and local officials can independently determine work authorization while *investigating* or *prosecuting* alleged violations. Opp. Br. 45-46. But the language on its face limits the state *court*'s consideration of evidence.[18]

Because the only reading of §§23-212(H) and 23-212.01(H) that gives effect to the entire provision precludes employers from rebutting the §1373(c) response on an employee's status, the Act constitutes a deprivation of due process. Opening Br. 55-56.[19]

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[18] Defendants' reading ignores not only the statutory language, but also the district court's recognition that "State enforcement officials and State courts must request and *rely exclusively* on the federal determination of 'immigration status or work authorization status' provided by USCIS under 8 U.S.C. § 1373." ER 36:6-8 (emphasis added). Apparently recognizing the flaws in Defendants' interpretation, the court declined to adopt it. ER 45:13.

[19] The Court need not certify to the Arizona Supreme Court any question about the Act's interpretation. *See* Opp. Br. 47 n.17. Whatever the meaning of the phrase "rebuttable presumption," §§23-212(H) and 23-212.01(H) do not allow Arizona courts to consider evidence other than the §1373(c) response to determine an employee's status because any other reading would ignore the first sentence. *Cf. ACLU of Nev. v. Heller*, 378 F.3d 979, 986-87 (9th Cir. 2004) (declining to certify question of whether narrow construction of statute is correct because statute is not "fairly susceptible" to such construction).

Defendants' alternative argument – that a court *bound* to follow the §1373(c) response provides sufficient process (Opp. Br. 48-50) – entirely misunderstands E-Verify and §1373(c). First, Defendants do not dispute that an *employee*'s ability to contest an E-Verify tentative nonconfirmation cannot provide due process to the *employer*. *See* Opening Br. 56-57. Defendants nevertheless suggest that employers have adequate process because they "[a]rguably" can request judicial review under the Administrative Procedures Act of an E-Verify nonconfirmation when it occurs *at the time of hire*. Opp. Br. 49. But any arguable availability of such review at the time of hire does not provide due process to the employer at the critical time when the sanctions proceedings take place and the "business death penalty" may be imposed.

Second, any process that E-Verify provides to employers is irrelevant because the Act relies on the §1373(c) response. The E-Verify system queries work authorization at *the time of hire*. But the §1373(c) response concerns an individual's *current* "status" – that is, "status" at the time of the state investigation into sanctions, *not* at the time of hire. Given the possibility of changes in individual status over time, E-Verify and §1373(c) answer different questions. *See* Opening Br. 56 n.17. As a result, even if the E-Verify program provided employers a chance to contest its outcome, it would not constitute due process with respect to the separate §1373(c) response.

Defendants' final argument, that §1373(c) itself affords adequate process, relies on pure speculation about the §1373(c) program (Opp. Br. 49-50) to dispute

Plaintiffs' citation of *record evidence* about how a §1373(c) response is produced. *See* ER 605; Opening Br. 46, 57. Moreover, even if employers had input into the §1373(c) response, the Act would still deny due process. Defendants suggest only that §1373(c) could allow employers to present information to a government agency, not a court. "A neutral judge is one of the most basic due process protections." *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003) (internal quotation marks omitted).

III. PLAINTIFFS HAVE STANDING

It is undisputed that Arizona's Act coerces E-Verify use, thereby causing economic harm sufficient for standing to sue the County Attorneys. Opening Br. 58-59; Opp. Br. 51. Plaintiffs also seek to enjoin state officials from implementing or enforcing the Act, and to require revocation of a notice to employers about the Act. ER 149-50, 192, 214, 251. The Director of the Department of Revenue, not County Attorneys, is responsible for the notice. *See* Opening Br. 60. The Attorney General is responsible for investigations. *See id.* So that they may obtain full relief, Plaintiffs seek a determination that they have standing to sue state officials.

Defendants argue that Plaintiffs lack standing to sue state officials because their actions under the Arizona Act have not caused Plaintiffs' E-Verify use. Opp. Br. 53-55. Defendants fundamentally misconstrue standing law.

First, Defendants fail to address *National Audubon Soc'y v. Davis*, which held that the economic loss to trappers from complying with a trapping restriction

was "fairly traceable" to the new law because of five factors: "(1) the newness of the statute; (2) the explicit prohibition against trapping contained in the text of [the law]; (3) the state's unambiguous press release mandating the removal of all [banned] traps . . . ; (4) the amendment of state regulations to incorporate [the new law]; and (5) the prosecution of one private trapper." 307 F.3d 835, 856 (9th Cir.), *amended by* 312 F.3d 416 (9th Cir. 2002). This case parallels *National Audubon* in every significant respect, as the district court found. ER 110:11-19. The Arizona Act is new, explicitly requires use of E-Verify (Ariz. Rev. Stat. §23-214(A)), and has been incorporated into state regulation. Ariz. R. Civ. P. 65.2. The Director of the Department of Revenue sent a letter to every Arizona employer explaining the Act and commanding compliance with its provisions. ER 299. Finally, as the district court found: "Widespread enforcement is promised, funded with appropriations. The likelihood of general prosecution is proven." ER 113:14-15; *cf. Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 507-08 (1972) (finding justiciable controversy where officials have not prosecuted but have "sought on the basis of the act and the threat of future enforcement to obtain compliance as soon as possible").

Second, Defendants argue that state officials do not cause Plaintiffs' E-Verify use merely because the Act does not contain an enforcement mechanism to "directly compel" E-Verify use and does not sanction its non-use. Opp. Br. 53. But the Act coerces employers by requiring enrollment in E-Verify, and linking substantial advantages to E-Verify use. For example, as the district court found,

§23-212(I) (and now §23-212.01(I)) provide employers with a "good faith" defense to liability, by creating a "rebuttable presumption" in favor of employers. ER 111:1-112:27. This Court has routinely recognized standing to challenge state acts that coerce harmful effects through means other than direct sanctions. *See, e.g., Clark v. City of Lakewood*, 259 F.3d 996, 1008 (9th Cir. 2001); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 707-08 (9th Cir. 1997); *Western Mining Council v. Watt*, 643 F.2d 618, 628 (9th Cir. 1981).[20]

Third, Defendants argue that state officials cannot be sued because they have no prosecutorial authority. Opp. Br. 53-54. Defendants have no answer to Plaintiffs' showing (Opening Br. 59) that, where economic injury is at issue, state officials' authority to prosecute is not required for standing. *See Nat'l Audubon Soc'y*, 307 F.3d at 855; *see also, e.g., Wilbur v. Locke*, 423 F.3d 1101, 1107-09 (9th Cir. 2005) (standing to sue state officials for allegedly illegal tribal compact that caused economic injury).[21]

Fourth, Defendants suggest that the state officials do not coerce Plaintiffs' use of E-Verify. *See* Opp. Br. 53-55. But the Director of the Department of

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[20] *Lake Carriers' Ass'n* is not to the contrary. That case involves a statute that, unlike the Arizona Act, only stood to coerce plaintiffs through prosecution, and nowhere suggests that direct enforcement mechanisms are required for standing. 406 U.S. at 507-08.

[21] Defendants rely on two cases that discuss prosecutorial authority, but those cases do not involve economic injury. *See Bronson v. Swensen*, 500 F.3d 1099, 1107-08 (10th Cir. 2007); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 916 (9th Cir. 2004).

Revenue and the Attorney General directly contribute to the Act's coercive effect. *See* Opening Br. 60. Defendants dismiss the Director's notice to employers as equivalent to a publisher printing a statute. Opp. Br. 55. But this Court has already concluded in *National Audubon* that exactly such notice – describing a law and instructing individuals how to comply – makes compliance "fairly traceable" to a new law. 307 F.3d at 843, 856. The Attorney General's investigative powers are also unquestionably central to the Act's enforcement scheme and the pressure it puts on employers to use E-Verify. Meaningful investigation makes real the possibility of sanctions proceedings; the real possibility of sanctions proceedings coerces employers to use E-Verify. "This chain of causation has more than one link, but it is not hypothetical or tenuous; nor do [the state officials] challenge its plausibility." *Id.* at 849.[22]

Finally, Defendants incorrectly suggest that Plaintiffs must show that relief against the state officials will entirely protect Plaintiffs from E-Verify use. *See* Opp. Br. 53-54. Plaintiffs have standing to sue state officials who contribute to the harm, even if those officials are not the only cause and cannot alone

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[22] For the same reasons, state officials' acts are fairly traceable to the diversion of resources resulting from E-Verify use. *See* Opening Br. 60-61 n.21. Contrary to Defendants' argument (Opp. Br. 55-56), Plaintiffs have shown "concrete and demonstrable injury to [their] organization[s'] activities – with the consequent drain on the organization[s'] resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). *See* ER 490-97, 500-04. Standing for such injury is not confined to fair housing cases. *See, e.g., El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1992) (as amended).

completely redress Plaintiffs' harm. *See Planned Parenthood*, 376 F.3d at 920 (standing to sue attorney general due to his prosecutorial authority even though county prosecutors could independently prosecute under challenged act); *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 701 (9th Cir. 1992) (standing because "were this court to rule in [plaintiff's] favor, it is *likely* that the alleged injury would be *to some extent* ameliorated") (emphases added).

IV. THE ELEVENTH AMENDMENT DOES NOT APPLY

Defendants also argue that the Eleventh Amendment bars Plaintiffs' claims against the state officials. Opp. Br. 56-58.[23] As Defendants concede, however, suits challenging the constitutionality of a state law and seeking declaratory and injunctive relief fall under the well-established exception to the Eleventh Amendment in *Ex Parte Young*, 209 U.S. 123 (1908). Opp. Br. 56. State officers sued in their official capacity, as here, must only have "*some* connection with the enforcement of [the] act." *Ex Parte Young*, 209 U.S. at 157 (emphasis added). This standard is met when state officials have specific duties that "giv[e] effect" to a challenged statute. *Los Angeles County Bar Ass'n*, 979 F.2d at 704.

The state officials' actions in this case give effect to and enforce both the Act's employer sanctions provisions and E-Verify requirement for the same reasons that Plaintiffs' injuries are fairly traceable to state officials' actions. *See*

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[23] This argument is waived as to the employer sanctions provisions, and as to E-Verify in *Arizona II*, because Defendants did not assert it below. PSER 1-25; *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 763 (9th Cir. 1999), *amended by* 201 F.3d 1186 (9th Cir. 2000).

generally Planned Parenthood, 376 F.3d at 920 ("For the same reasons [as standing requirements are satisfied], both defendants are properly named under *Ex parte Young*."). The Director of the Department of Revenue's action to inform employers about the Act ensures that all employers are knowledgeable and have the opportunity to comply. *Cf. Nat'l Audubon Soc'y*, 307 F.3d at 843, 847 (Eleventh Amendment does not bar suit against director of state agency responsible for enforcement including press release about new law). The Attorney General's duty to investigate and refer complaints is integral to the Act's sanctions scheme, and gives effect to the E-Verify requirement by coercing employers to enroll.

Defendants argue that the connection between these statutory duties and the Act is "minimal" because the County Attorneys retain prosecutorial authority. Opp. Br. 58.[24] But state officials need not have sole or primary responsibility. *See Los Angeles County Bar Ass'n*, 979 F.2d at 701, 704 (finding Eleventh Amendment did not protect from suit defendants who were only involved "to some extent" in alleged injuries and were not solely responsible for implementation); *Planned Parenthood*, 376 F.3d at 920 (concluding that attorney general had "some

[24] Defendants primarily rely on cases discussing state officials' general supervisory powers or general duties to enforce state law. Opp. Br. 57. These cases are inapposite because the Attorney General's duty to investigate and the Director of the Department of Revenue's duty to give notice are specific to the Act, and distinct from supervision of other officials.

connection" to challenged statute even though county prosecutors could also have performed relevant tasks).

Further, the state officials' duties under the Act are anything but minimal. The notice to employers and the investigations and referrals are central to the Act's core purpose: to reduce the employment of unlawful workers. *National Audubon*, which Defendants cite (Opp. Br. 58), does not suggest otherwise. The state officials are therefore amenable to suit.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief is proportionately spaced in Times New Roman font, 14 point type, and that this brief contains 6,976 words, exclusive of the corporate disclosure statement, table of contents, table of authorities, certificate of compliance, and proof of service. This certification is based upon the word count of the word processing system used in preparing this brief.

Dated: May 13, 2008 By: _____
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