

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.

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 preemption 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*

