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20 UNITED STATES DISTRICT COURT

21 FOR THE DISTRICT OF ARIZONA

22 PHOENIX DIVISION

23 CHICANOS POR LA CAUSA, INC.; and)
SOMOS AMERICA,)
24 Plaintiffs,)
25 vs.)
26 JANET NAPOLITANO, *et al.*,)
27 Defendants.)
28

Case No. CIV-07-1684-PHX-MHB
(Consolidated with Case No. CIV-07-
1355-PHX-NVW)

**SUPPLEMENTAL MEMORANDUM
OF POINTS AND AUTHORITIES
PURSUANT TO ORDER OF
SEPTEMBER 14, 2007**

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INTRODUCTION

Plaintiffs challenge the Legal Arizona Workers Act (the “Act”) on two constitutional grounds. First, establishing a unique Arizona system for sanctioning employers that employ aliens who are not authorized to work in the face of Congress’ uniform federal scheme and mandating employer participation in a voluntary, experimental, and temporary federal employment eligibility verification program are both preempted under the United States Constitution’s Supremacy Clause. Second, the Arizona Act deprives employers and workers of liberty and property without meaningful protections as required by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

In a memorandum of points and authorities submitted on September 6, 2007 (“Pl. Opening Mem.”), plaintiffs demonstrated that the Act is preempted by federal immigration law. In brief, Congress created a comprehensive system to regulate the employment of non-citizens that carefully balances the important interests at stake and leaves no room for Arizona to decide to set up a different scheme; the Act’s prohibition on employers intentionally or knowingly employing an unauthorized alien and requirement that employers verify employment eligibility threaten that careful balance and are preempted. *Id.* at 7-15.

In that memorandum, plaintiffs also demonstrated the irreparable injury stemming from the Act and showed that the balance of harms strongly favors plaintiffs. *Id.* at 15-17. Because the parties have agreed and the Court has ordered that the proceedings on the preliminary injunction are to be consolidated with the merits, these issues need not be decided. *See, e.g., Western Systems, Inc. v. Ulloa*, 958 F.2d 864, 872 (9th Cir. 1992).

This supplemental memorandum addresses the second constitutional ground for striking down the employer sanctions provisions of the Act – lack of due process – which plaintiffs did not address in the opening memorandum. As demonstrated below, due process requires more procedural protections than the Act affords before denying employers the ability to operate a business and lawful employees the ability to work.

1 **ARGUMENT**

2 The Due Process Clause of the Fourteenth Amendment provides: “nor shall any
3 state deprive any person of life, liberty, or property, without due process of law.” U.S.
4 Const., amend. XIV, §1. The Supreme Court has described due process as follows: “the
5 Due Process Clause provides that certain substantive rights – life, liberty, and property –
6 cannot be deprived except pursuant to constitutionally adequate procedures.” *Cleveland*
7 *Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Therefore: “Procedural due
8 process rules are meant to protect persons not from the deprivation, but from the mistaken
9 or unjustified deprivation of life, liberty, or property.” *Carey v. Piphus*, 435 U.S. 247,
10 259 (1978). Plaintiffs show first that there are liberty and property interests at stake and
11 then that the procedures that attend the deprivations of those interests are constitutionally
12 deficient.

13 1. As a threshold matter, the Act interferes with both protected “property” and
14 “liberty” interests of employers and employees in the employment contract. From the
15 perspective of employees who are authorized to work, “the significance of the private
16 interest in retaining employment cannot be gainsaid. We have frequently recognized the
17 severity of depriving a person of the means of livelihood.” *Loudermill*, 470 U.S. at 543.
18 Thus, “the right to hold specific private employment and to follow a chosen profession
19 free from unreasonable governmental interference comes within the ‘liberty’ and
20 ‘property’ concepts.” *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *see also Truax v.*
21 *Raich*, 239 U.S. 33, 41 (1915) (“It requires no argument to show that the right to work for
22 a living in the common occupations of the community is of the very essence of the
23 personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment
24 to secure.”).

25 For employers also, the law implicates weighty interests. Employers, just as
26 employees, have a liberty interest in continuing work. *See Wedges/Ledges of Cal., Inc. v.*
27 *City of Phoenix*, 24 F.3d 56, 66 n.4 (9th Cir. 1994) (“[C]orporations, as legal persons,
28 also can assert a right to pursue an occupation.”). To the extent that they are deprived of

1 lawful workers, employers’ liberty interests in running their businesses are impinged.
2 Arizona law also recognizes property interests in business licenses. *Bennett v. Arizona*
3 *State Bd. of Public Welfare*, 95 Ariz. 170, 173 (Ariz. 1963) (“It is too well settled . . . that
4 procedural due process requires . . . an opportunity to be heard upon . . . denying a
5 license.”); *see also Wedges/Ledges*, 24 F.3d at 62-64 (finding property right in license
6 tags because provisions governing licenses substantially limit discretion of government
7 officials). Finally, Arizona law recognizes a property interest in articles of incorporation
8 and grants of authority by requiring the State to file them if they satisfy the statutory
9 requirements. Ariz. Rev. Stat. §§10-125(B), 10-1503(C). In sum: “The employer
10 plaintiffs . . . possess Fourteenth Amendment property and liberty interests in running
11 their businesses.” *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 533 (M.D. Pa. 2007).

12 2. Because the Act interferes with protected liberty and property interests, the
13 analysis turns to what procedural protections are due. “The fundamental requirement of
14 due process is the opportunity to be heard ‘at a meaningful time and in a meaningful
15 manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*,
16 380 U.S. 545, 552 (1965)). In considering whether sufficient process has been afforded,
17 courts inquire into (1) “the private interest that will be affected by the official action”; (2)
18 “the risk of an erroneous deprivation of such interest through the procedures used, and the
19 probable value, if any, of additional or substitute procedural safeguards”; and (3) “the
20 Government’s interest, including the function involved and the fiscal and administrative
21 burdens that the additional or substitute procedural requirement would entail.” *Mathews*,
22 424 U.S. at 335. At a minimum, “[a]n essential principle of due process is that a
23 deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing
24 appropriate to the nature of the case.’” *Loudermill*, 470 U.S. at 542 (quoting *Mullane v.*
25 *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

26 The investigation and court procedures contemplated by the Legal Arizona
27 Workers Act do not provide employers or employees with the opportunity to be heard
28 regarding the work status of the employee “in a meaningful manner.” *Mathews*, 424 U.S.

1 at 333. Enforcement of the prohibition on employers intentionally or knowingly
2 employing an unauthorized alien is initiated by a complaint, which can be filed by anyone
3 with no notice to the employer or employee at issue. *See* Ariz. Rev. Stat. §23-212(B).
4 The Arizona Attorney General or county attorney must investigate the complaint by
5 attempting to verify the employment authorization of the alleged unauthorized alien with
6 the federal government, according to the procedure set forth in 8 U.S.C. §1373(c), again
7 with no notice to the employer or employee. Ariz. Rev. Stat. §23-212(B). 8 U.S.C.
8 §1373(c) provides merely that the federal government “shall respond to an inquiry by a
9 Federal, State, or local government agency, seeking to verify or ascertain the *citizenship*
10 *or immigration status* of any individual within the jurisdiction of the agency for any
11 purpose authorized by law, by providing the requested verification or status information.”
12 (Emphasis added). Neither the statute nor regulations provide any indication of the
13 manner in which citizenship or immigration status is verified under §1373(c).

14 Moreover, §1373(c) does not provide for verification of *employment authorization*
15 status, which is different than citizenship and immigration status. Many non-citizens
16 have employment authorization status. For example, federal regulations list 16 categories
17 of aliens who are authorized for any employment and 20 categories of aliens who are
18 authorized for employment with a specific employer. 8 C.F.R. §274a.12(a), (b). In
19 addition, other categories of non-citizens who currently lack immigration status, such as
20 asylum applicants, may apply for and be granted work authorization while their
21 applications for immigration status are pending. *E.g.*, 8 U.S.C. §1158(d)(2), 8 C.F.R.
22 §274a.12(c)(8) (asylum and withholding of removal applicants); 8 C.F.R. §274a.12(c)(9)
23 (applicants for adjustment of status to lawful permanent resident); 8 C.F.R.
24 §274a.12(c)(10) (applicants for suspension of deportation or cancellation of removal).
25 Thus, rather than querying a person or entity that has information about work status –
26 such as the employer, employee, or relevant government agency – the Act requires resort
27 to an inquiry procedure aimed at an entirely different question without notice to the
28 affected employer and employee.

1 For all non-frivolous complaints, the Act requires that the county attorney bring an
2 action against the employer in Arizona Superior Court. Ariz. Rev. Stat. §23-212(D). In
3 deciding whether an employee is employment authorized, the Superior Court may *only*
4 consider the federal government’s “determination” under 8 U.S.C. §1373(c), even though
5 that “determination” supposedly creates a “rebuttable presumption of the employee’s
6 lawful status” (Ariz. Rev. Stat. §23-212(H)), and even though §1373(c) does not concern
7 work eligibility. In other words, the federal government’s response on a question other
8 than the question before the Superior Court is dispositive as to the employee’s status.

9 This procedure does not afford adequate protections. By way of comparison,
10 under federal immigration law, a violation for employing an unauthorized alien is found
11 only after a number of steps including notice and an opportunity for a hearing before a
12 federal administrative law judge with expertise in immigration matters who determines
13 “upon the preponderance of the evidence received,” including any witnesses and
14 production of evidence, that the violation had occurred. 8 U.S.C. §1324a(e)(2)-(3)(C).
15 The federal inquiry procedure under 8 U.S.C. §1373(c) plays *no* role. Moreover, any
16 errors resulting from delays in entering information into federal databases (*see* Dec. of
17 Tyler Moran ¶6) can be corrected. By contrast, the status of the employee under the Act
18 is determined *solely* by resort to the federal inquiry procedure that takes place prior to any
19 notice to employers or employees. The response to that inquiry substitutes for witness
20 testimony including cross-examination, documentary evidence, and a determination by a
21 neutral with expertise in immigration – because, as discussed above, the response to the
22 inquiry is binding on the Superior Court. Thus, any mistakes in the inquiry procedure will
23 result in an incorrect decision with no opportunity to correct the mistakes. Employees
24 who are authorized to work will instead be deemed unauthorized, and employers will be
25 at risk of losing their licenses as a result. This is a classic due process violation.

26 Moreover, even were the Superior Court able to look behind the federal inquiry
27 procedure – which the Act forbids – state courts have neither the expertise nor, more
28 importantly, the legal authority to adjudicate disputes surrounding work status under

1 federal immigration law. As plaintiffs previously demonstrated, Congress has already set
2 up an exclusive system to make the very determination the Act seeks to make in a
3 different manner. Pl. Opening Mem. at 7-13. Congress provided that determinations
4 about work authorization would be made by administrative law judges with expertise in
5 immigration matters. Arizona may not second-guess that decision and instead provide
6 such authority to state judges. This insufficient process means employers who may not be
7 found in violation of federal law could be found liable under the Act.

8 Because the Act lacks meaningful procedural protections, the three *Mathews*
9 factors strongly favor plaintiffs. First, the interests affected are important: the loss of
10 employer and employee livelihood creates a tremendous hardship. Second, given that
11 Congress put into place a much more stringent system, there can be no question that there
12 is a significant risk of erroneous deprivation under the Act and that there is great value to
13 additional safeguards. Third, because the federal government has already established a
14 system for preventing unauthorized employment, there is no cost to the State in utilizing
15 that system. Arizona's disagreement with the federal system is irrelevant because federal
16 law governs by operation of the Supremacy Clause.

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CONCLUSION

For these reasons and the reasons given in the opening memorandum, the Court should enjoin defendants from implementing or enforcing Sections 2 and 3 of the Legal Arizona Workers Act and issue a declaration that these sections are unlawful and invalid.

Dated: September 25, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2007, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrants:

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