

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, S.C. **SUPERIOR COURT**

RHODE ISLAND COALITION AGAINST DOMESTIC VIOLENCE; RHODE ISLAND AFFILIATE, AMERICAN CIVIL LIBERTIES UNION; ANN MARIE MUMM; and DANIEL WEISMAN,	:	
Plaintiffs	:	
v.	:	C.A. NO.
DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island; and JEROME WILLIAMS, in his capacity as Director of the RHODE ISLAND DEPARTMENT OF ADMINISTRATION,	:	
Defendants	:	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This is a civil action requesting injunctive and other relief in response to the unlawful action taken by the Governor in issuing Executive Order 08-01 and by the Rhode Island Department of Administration in issuing a notice pursuant to that order.

JURISDICTION

1. The Superior Court has original jurisdiction over this controversy pursuant to the Rhode Island Constitution, Art. I § 2, and the Uniform Declaratory Judgment Act, R.I.G.L. §9-30-1 et seq. The Uniform Declaratory Judgment Act vests the Superior Court with “the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” R.I.G.L. §9-30-1.

PARTIES

2. Plaintiff Rhode Island Affiliate, American Civil Liberties Union (“RICLU”) is the local chapter of the national public interest organization established for the purpose of

promoting civil liberties and has a place of business in Providence, Rhode Island.

The RICLU has a membership of approximately two thousand five hundred (2,500) people. As an association of not less than 25 members, the RICLU is authorized by R.I. Gen. Laws §42-35-3(a)(2) to request oral hearings and substantive rule making proceedings. The RICLU is interested in and concerned with the Governor's Executive Order 08-01, which orders the Rhode Island Department of Administration to require all businesses contracting with the State of Rhode Island to register with and utilize the internet-based system operated by the Department of Homeland Security (DHS) known as E-Verify. The RICLU is interested in substantive rulemaking proceedings that Defendants failed to undertake. The RICLU's participation has been precluded by a lack of public notice of proposed rule making, required under R.I. Gen. Laws §42-35-3(a).

3. The Rhode Island Coalition Against Domestic Violence ("RICADV") is a non-profit organization that has a place of business in Warwick, Rhode Island. The RICADV has an active purchase order from the State of Rhode Island.
4. Ann Marie Mumm is a professor at Rhode Island College, located in Providence, Rhode Island. Professor Mumm has an active purchase order from the State of Rhode Island.
5. Daniel Weisman is a professor at Rhode Island College, located in Providence, Rhode Island. Professor Weisman is a subcontractor for an entity that has an active purchase order from the State of Rhode Island.

6. Donald L. Carcieri is sued in his capacity as Governor of the State of Rhode Island and, in that capacity, has enacted Executive Order 08-01, which is the subject of this litigation.
7. Jerome Williams is sued in his capacity as Director of the Rhode Island Department of Administration. The Department of Administration is responsible for implementing Paragraph 2 of Executive Order 08-01 and is authorized to promulgate rules and regulations regarding the implementation of Paragraph 2.

STATEMENT OF FACTS

8. On March 27, 2008, Defendant Carcieri issued Executive Order 08-01. Paragraph 2 of the Executive Order states:

The Department of Administration shall require that all persons and businesses, including grantees, contractors and their subcontractors and vendors doing business with the State of Rhode Island also register and utilize the services of the E-Verify program to ensure compliance with federal and state law.

9. The E-Verify program is an internet database run by the Department of Homeland Security that allows employers to verify the employment eligibility of new hires. However, since its launch, the E-Verify program has been riddled with significant flaws, and returns inaccurate information regarding the immigration and employment status of new hires at a more than *de minimis* rate.
10. On or around July 29, 2008, the Department of Administration began mailing notices to “Persons and Businesses on the State of Rhode Island Vendor Registration List.” See Attached. The notice states that all employers doing or seeking to do business with the State must certify that they and their subcontractors are registered to use the E-Verify program and will use it to confirm that those they hire are authorized to

work in the United States. Accompanying the notice are certification forms for vendors and bidders acting either as individuals or entities. The notice states that the recipient must complete and sign the appropriate certification in the presence of a Notary Public and return it within forty-five (45) days from the date of the notice. The notice also requires contractors to assure that all subcontractors “continue to be registered and utilize the E-Verify program.” ***The notice states that failure to comply will prohibit the recipient from obtaining business from the State of Rhode Island in the future and may adversely affect the recipient’s ability to continue with current business with the State of Rhode Island.***

11. Paragraph 2 of Executive Order 08-01 and the E-Verify program pose a number of problems. The Executive Order mandates use of a program which is still in its pilot stage and has serious flaws. It could deprive state contractor employees of their livelihoods due to the inaccuracies and database flaws, which misidentify workers, and it will have a disproportionate effect on naturalized citizens as opposed to native-born citizens. The E-Verify program also has a substantial rate of employer abuse and could lead to increased discrimination against potential employees perceived as “foreign.” Finally, the E-Verify program is vulnerable to security threats and could compromise worker privacy.
12. Plaintiffs RICADV, Ann Marie Mumm and Daniel Weisman received the above-referenced notice from the Department of Administration. These Plaintiffs may lose their existing contracts with the State of Rhode Island if they refuse to comply with the requirements discussed in the notice; they may incur significant burdens if they do register with and use E-Verify and must verify subcontractor compliance; and they

may be subject to significant liabilities if they use E-Verify, due to its high error-rate, or fail to assure utilization of E-Verify by any subcontractors.

13. Defendants have failed to promulgate any rules or regulations or initiate any formal rulemaking procedures pursuant to the Administrative Procedures Act regarding the implementation of Paragraph 2 of Executive Order 08-01.

COUNT I

Injunctive Relief

14. Plaintiffs hereby incorporate by reference Paragraphs 1 through 13 of the Complaint as if fully set forth herein.
15. Plaintiffs have a likelihood of success on the merits.
16. Plaintiffs have no adequate remedy at law.
17. The balancing of equities requires that the requested relief be granted.
18. Plaintiffs are otherwise entitled to mandatory injunctive relief.

COUNT II

Due Process of Law/Ultra Vires

19. Plaintiffs hereby incorporate by reference Paragraphs 1 through 18 of the Complaint as if fully set forth herein.
20. Defendant Carcieri, by his Executive Order 08-01, has acted under color of law without lawful authority and beyond the scope of his official power, by imposing rules that encroach upon the legislative powers and that conflict with the rule-making procedures of the Administrative Procedures Act.
21. Defendant has thereby arbitrarily and capriciously imposed invalid conditions, both procedurally and substantively, upon Plaintiffs, subjecting Plaintiffs to these

conditions under direct threat of deprivation of significant contractual property interests.

22. Defendants' *ultra vires* action has thereby violated Plaintiffs' rights to due process of law under Article I, Section 2 of the Rhode Island Constitution.

COUNT III

Separation of Powers

23. Plaintiffs hereby incorporate by reference Paragraphs 1 through 22 of the Complaint as if fully set forth herein.
24. The provisions of Paragraph 2 of Executive Order 08-01 and the notice sent by the Department of Administration, insofar as they impose compulsory conditions upon Plaintiffs, private parties, and further threaten sanctions against Plaintiffs for failing to obey these provisions, have the force and effect of law.
25. By imposing these compulsory conditions having the force and effect of law, Defendant Carcieri has encroached upon the legislative powers of the General Assembly to enact laws on State contracting. For example, R.I.G.L. §37-2-13(d) states "no state purchasing regulation shall change in any way a contract commitment by the state nor of a contractor to the state which was in existence on the effective date of the regulation." The Executive Order and the Department of Administration's notice conflict with this statute by altering the terms of currently existing state contracts and establishing consequences for contractors' failure to abide by the new terms.
26. The Executive Order and the notice also conflict with R.I.G.L. §42-11-1 et seq., which authorizes the Department of Administration to contract for the State; and

R.I.G.L. §37-2-1 et seq., which “shall apply to every expenditure of public funds” and which delegates power and authority over purchasing regulations to the chief purchasing officer, and prohibits the purchasing officer from delegating power to issue purchasing regulations “to any other person or agency.”

27. By encroaching upon these legislative powers of the General Assembly, Defendant has disregarded the laws of the State and violated the Constitutional Separation of Powers, to the injury and detriment of the Plaintiffs.

COUNT IV

Administrative Procedures Act

28. Plaintiffs hereby incorporate by reference Paragraphs 1 through 27 of the Complaint as if fully set forth herein.

29. R.I. Gen. Laws §42-56-12 directs and authorizes the Director of the Department of Administration to make and promulgate necessary rules and regulations incident to the exercise of his powers and the performance of his duties as enumerated therein.

30. The Department of Administration is required by the Administrative Procedures Act to follow the procedures contained in R.I. Gen. Laws §42-35-3, which mandates the giving of notice of intended action prior to promulgation of rules and regulations, and the affording to all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing, on such promulgated rules and regulations.

31. Defendant Williams has failed to promulgate any official rules or regulations, as required by R.I.G.L. §42-35-3, regarding the Department of Administration’s implementation of Paragraph 2 of Executive Order 08-01.

32. Actions taken by the Department of Administration to implement Executive Order 08-01 (including, but not limited to, the distribution of vendor/bidder certification forms, the establishment of a specific time period for compliance, the establishment of consequences for non-compliance, and the requirement that state contractors assure that subcontractors register with and use the E-Verify program) constitute *de facto* regulations.
33. The Department of Administration's promulgation of rules and regulations without prior public notice and opportunity to comment violates R.I. Gen. Laws §42-35-3.
34. There are no administrative remedies available to the Plaintiffs.

COUNT V

Contract Clause of the Rhode Island Constitution

35. Plaintiffs hereby incorporate by reference Paragraphs 1 through 34 of the Complaint as if fully set forth herein.
36. The Contract Clause of the Rhode Island Constitution, R.I. Const. Art. I, § 12, prohibits the State of Rhode Island from enacting laws that substantially impair the obligation of existing contracts.
37. The implementation of Paragraph 2 of Executive Order 08-01 violates the Contract Clause because it will substantially impair existing contracts between Plaintiffs and the State of Rhode Island.

WHEREFORE, Plaintiffs pray that this Court grant the following relief:

1. That this Court declare that Governor Carcieri did not have the authority to issue Paragraph 2 of Executive Order 08-01 and that the Department of Administration does not have the authority to implement it.

OR, in the alternative, that this Court declare that Defendants' enforcement of Paragraph 2 of Executive Order 08-01 is *ultra vires* and order Defendants to promulgate regulations in accordance with the Administrative Procedures Act, R.I. Gen. Laws §42-35-3, and in such a manner as to afford the public and other affected parties with a meaningful opportunity to submit written or oral data, views or arguments;
2. That this Court order that Defendants be preliminarily and permanently enjoined from implementing Paragraph 2 of Executive Order 08-01;
3. That this Court grant a temporary restraining order enjoining Defendants from taking any action pursuant to Paragraph 2 of Executive Order 08-01, including requiring Plaintiffs to certify that they have registered with and utilize E-Verify; or rescinding or failing to fulfill obligations pursuant to contracts between Plaintiffs and the State of Rhode Island. If a temporary restraining order is not granted, Plaintiffs will suffer immediate and irreparable harm;
4. That this Court award Plaintiffs attorney's fees and other litigation expenses under the Equal Access to Justice Act; and
5. That this Court grant such other relief as it deems just and proper.

PLAINTIFFS
By their attorney,

Randy Olen, Esq.
Rhode Island Affiliate,
American Civil Liberties Union
55 Bradford Street, Suite 203
Providence, RI 02903
(401) 274-1400
(401) 274-2480 (fax)
Attorney for Plaintiffs

DATED: September 3, 2008

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, S.C.**

SUPERIOR COURT

**RHODE ISLAND COALITION AGAINST
DOMESTIC VIOLENCE; RHODE ISLAND
AFFILIATE, AMERICAN CIVIL
LIBERTIES UNION; ANN MARIE MUMM;
and DANIEL WEISMAN,
Plaintiffs**

v.

**DONALD L. CARCIERI, in his capacity
as Governor of the State of Rhode Island;
and JEROME WILLIAMS, in his
capacity as Director of the RHODE
ISLAND DEPARTMENT OF
ADMINISTRATION,
Defendants**

C.A. NO.

AFFIDAVIT OF DEBORAH DEBARE

I, Deborah DeBare, do hereby depose as follows:

1. I am a resident of North Kingstown, Rhode Island and the Executive Director of the Rhode Island Coalition Against Domestic Violence (“RICADV”). I have been the Executive Director of RICADV for nearly thirteen (13) years.
2. The RICADV is a statewide nonprofit advocacy organization dedicated to ending domestic violence.
3. The RICADV has two contracts with the State of Rhode Island.
4. One contract is a grant from the courts’ budget for the purpose of providing court advocates for victims of domestic violence.
5. The second contract is a community service grant from the General Assembly. The purpose of this grant is to provide services for children who witness domestic violence.
6. The legislative community service grant is administered through the Department of Human Services. The court advocacy program grant is administered through the Rhode Island Supreme Court.

7. The RICADV subcontracts with domestic violence shelters throughout the State of Rhode Island to provide services directly to victims of domestic violence and their children.
8. On or around July 29, 2008, the RICADV received a notice from the Department of Administration. The notice states that all employers doing or seeking to do business with the State must certify that they and their subcontractors are registered to use the E-Verify program and will use it to confirm that those they hire are authorized to work in the United States. Accompanying the notice are certification forms for vendors and bidders acting either as individuals or entities. The notice states that RICADV must complete and sign the appropriate certification in the presence of a Notary Public and return it within forty-five (45) days from the date of the notice. The notice states that failure to comply will prohibit the RICADV from obtaining business from the State of Rhode Island in the future and may adversely affect the recipient's ability to continue with current business with the State of Rhode Island.
9. In response to this notice from the Department of Administration, the RICADV registered with E-Verify to ensure that it would continue to receive the funding which allows it to continue to provide valuable services to communities in Rhode Island. Because the notice did not specify which State contract triggered the E-Verify requirement, the RICADV could not even make an informed decision as to whether it would consider rejecting a grant in order to avoid having to comply with the requirements of the Department of Administration's notice.
10. However, the RICADV strongly disapproves of mandatory use of the E-Verify program in light of its unreliability and the time required to ensure compliance with the program.
11. The RICADV has a number of subcontractors and will have to expend significant time and money if required to assure that all of these subcontractors register with and continue to use E-Verify.
12. The RICADV prides itself on its diverse staff and is concerned that mandatory use of the E-Verify program may discourage some applicants from applying, particularly foreign-born citizens, due to E-Verify's high error rate.

I swear under the pains and penalties for perjury that the above is true and correct.

Deborah DeBare

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, S.C. SUPERIOR COURT**

RHODE ISLAND COALITION AGAINST	:	
DOMESTIC VIOLENCE; RHODE ISLAND	:	
AFFILIATE, AMERICAN CIVIL	:	
LIBERTIES UNION; ANN MARIE MUMM;	:	
and DANIEL WEISMAN,	:	
Plaintiffs	:	
	:	
v.	:	C.A. NO.
	:	
DONALD L. CARCIERI, in his capacity	:	
as Governor of the State of Rhode Island;	:	
and JEROME WILLIAMS, in his	:	
capacity as Director of the RHODE	:	
ISLAND DEPARTMENT OF	:	
ADMINISTRATION,	:	
Defendants	:	

AFFIDAVIT OF DANIEL WEISMAN

I, Daniel Weisman, do hereby depose as follows:

13. I am a resident of Barrington, Rhode Island and a professor of social work at Rhode Island College in Providence, Rhode Island.

14. I have a contract with Capitol City Community Center as part of a contract the Community Center has with the Rhode Island Department of Health. I have been hired through this contract to serve as a consultant to evaluate “Can We Talk?,” a Department of Health program designed to educate parents on discussing delicate issues with their children.

15. On or around July 29, 2008, I received a notice from the Department of Administration. The notice states that all employers doing or seeking to do business with the State must certify that they and their subcontractors are registered to use the E-Verify program and will use it to confirm that those they hire are authorized to work in the United States. Accompanying the notice are certification forms for vendors and bidders acting either as individuals or entities. The notice states that I must complete and sign the appropriate certification in the presence of a Notary Public and return it within forty-five (45) days from the date of the notice. The notice states that failure to comply will prohibit me from obtaining business from the State of Rhode Island in the future and may adversely affect my ability to continue with current business with the State of Rhode Island.

16. I strongly disapprove of mandatory use of the E-Verify program in light of its unreliability and the time required to ensure compliance with the program. I also oppose its use as a matter of public policy, particularly in light of my awareness of the discriminatory impact of the program on naturalized citizens and other foreign-born workers. If forced to register with E-Verify, I will have to take time away from my work to attend to the E-Verify tutorial and comply with the E-Verify administrative requirements, such as posting notices visible to prospective employees, becoming familiar with the E-Verify manual, and issuing writing right-to-appeal notices to employees who are “non-confirmed” by the E-Verify system. If I find that I do not have time to comply with these requirements personally, I will have to hire someone to help me utilize the E-Verify program.
17. Though I believe my contract with the Capitol City Community Center triggered the notice from the Department of Administration, the notice did not specify. Therefore, I can not even make an informed decision as to whether I would consider losing a contract in order to avoid having to comply with the requirements of the notice.
18. Though I do not currently have any subcontractors, I may in the future and I am concerned about having to assure that they are registered with and utilize E-Verify.
19. Finally, I am concerned that mandatory use of the E-Verify program may discourage some applicants from applying for employment with me, particularly foreign-born citizens, due to E-Verify’s high error rate.

I swear under the pains and penalties for perjury that the above is true and correct.

Daniel Weisman