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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
**MOTION FOR PRELIMINARY
INJUNCTION; MEMORANDUM
OF POINTS AND AUTHORITIES**
ORAL ARGUMENT REQUESTED
DECISION REQUESTED BY
SEPTEMBER 28, 2007

1 **MOTION**

2 Pursuant to F.R.C.P. 65, plaintiffs move for a preliminary injunction to enjoin
3 defendants from implementing and enforcing Sections 2 and 3 of the Legal Arizona
4 Workers Act. The motion is brought on the grounds that plaintiffs’ likelihood of success
5 on the merits and the balance of harms support entry of a preliminary injunction. The
6 motion is supported by the following Memorandum of Points and Authorities, the
7 declarations of Edmundo Hidalgo and Tyler Moran, all documents on file in this action,
8 and any further arguments or evidence presented.

9 Dated: September 6, 2007

By: /s/ Kristina M. Campbell
Kristina M. Campbell

10
11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **INTRODUCTION**

13 Arizona recently enacted and is poised to start implementing by October 1, 2007,
14 an unconstitutional immigration law. The Legal Arizona Workers Act (the “Act”)
15 establishes a system unique to Arizona for sanctioning employers that employ aliens who
16 are not authorized to work even though Congress, in enacting a uniform federal scheme
17 for the same purpose, prohibited states from crafting their own schemes. The Act’s
18 sanctions scheme conflicts with federal law in multiple ways. The Act also unlawfully
19 makes mandatory employer participation in a voluntary, experimental, and temporary
20 federal employment eligibility verification program.

21 A federal district court recently issued temporary and permanent injunctions
22 against a local law with similar provisions, and found the law preempted under the United
23 States Constitution’s Supremacy Clause. *Lozano v. City of Hazleton*, 459 F.Supp.2d 332
24 (M.D. Pa. 2006) (“*Lozano I*”) (issuing TRO); *Lozano v. City of Hazleton*, ___ F.Supp.2d
25 ___, 2007 WL 2163093 (“*Lozano II*”) (M.D. Pa. July 26, 2007). We demonstrate below
26 that the Act violates the Supremacy Clause because it is preempted by federal
27 immigration law. The laws Congress created to regulate the employment of non-citizens
28 confer rights and responsibilities in a careful balance reflecting the national interest. The

1 Act’s prohibition on employers intentionally or knowingly employing an unauthorized
2 alien and requirement that employers verify employment eligibility threaten that balance
3 and are preempted. Plaintiffs seek a preliminary injunction to prevent the harm that will
4 ensue from the implementation of the Act.

5 **BACKGROUND**

6 **I. FEDERAL IMMIGRATION LAW**

7 The federal government has established a comprehensive system of laws,
8 regulations, procedures, and agencies that determine, subject to judicial review, whether
9 and under what conditions a person may enter and live in the United States. In 1986,
10 Congress for the first time included in that comprehensive system a prohibition on
11 employers knowingly hiring unauthorized aliens and a detailed employment verification
12 process with sanctions for employing unauthorized aliens. Immigration Reform and
13 Control Act of 1986 (“IRCA”), 8 U.S.C. §§1324a-1324b.

14 The Immigration and Nationality Act (“INA”), 8 U.S.C. §1101, *et seq.*, as
15 amended by IRCA sets forth a comprehensive employer sanctions scheme, including the
16 following: It is unlawful to hire an alien “knowing the alien is an unauthorized alien.” 8
17 U.S.C. §1324a(a)(1)(A).). There is an “employment verification system” (known as the
18 “I-9 process”) that requires an individual seeking work to present a document or
19 documents sufficient to establish employment authorization and identity. 8 U.S.C.
20 §1324a(b)(1). The employer is required only to verify that the documents appear genuine,
21 not to take any affirmative steps to verify the information. 8 U.S.C. §1324a(b)(1)(A).
22 Compliance in good faith with the federal employment verification system is an
23 affirmative defense to liability, and a good faith attempt to comply generally establishes
24 compliance despite any technical or procedural failures. 8 U.S.C. §§1324a(a)(3), (b)(6).

25 The federal employer sanctions scheme does not apply to all situations where a
26 business entity pays money for work performed. For instance, employers are not required
27 to undertake the I-9 process for certain categories of workers, such as independent
28 contractors and casual domestic workers. 8 C.F.R. §274a.1(f), (h), (j).

1 Under the federal scheme, for a violation to be found there must be notice, an
2 opportunity for a hearing before a federal administrative law judge, a finding that a
3 violation has occurred based on a preponderance of the evidence, a chance for an
4 administrative appeal, and an opportunity for review in the appropriate U.S. Court of
5 Appeals. 8 U.S.C. §1324a(e)(2)-(3), (7)-(8). An offending employer is subject to a
6 graduated system of civil penalties. 8 U.S.C. §1324a(e)(4). Pattern or practice violators
7 are subject to criminal penalties and injunctions. 8 U.S.C. §1324a(f). The federal scheme
8 also carefully balances the verification requirements with extensive antidiscrimination
9 provisions designed to discourage and penalize discrimination based on national origin or
10 citizenship status. 8 U.S.C. §1324b.

11 Congress also established a *voluntary, experimental, and temporary* program
12 called the “Basic Pilot Program” in the Illegal Immigration Reform and Immigrant
13 Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208 (Sept. 30, 1996). 8 U.S.C.
14 §1324a note. The Basic Pilot Program – recently renamed the “E-Verify” program – is a
15 program that permits employers to supplement the I-9 process by verifying an employee’s
16 work authorization with the federal government over the Internet. Dec. of Tyler Moran
17 (“Moran Dec.”) ¶6. The Program is scheduled to terminate in November 2008. Basic
18 Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156 (Dec. 3, 2003).

19 Employers who use the Program must engage in various activities, including
20 learning how to use the Program; registering for the Program, which includes signing a
21 Memorandum of Understanding (“MOU”) with the Department of Homeland Security
22 (“DHS”) and Social Security Administration (“SSA”); installing software; and submitting
23 to the Program for all new hires data such as employee name, date of birth, and social
24 security number. Moran Dec. ¶¶7-8, 19.

25 The MOU imposes requirements on employers, including the following: All
26 employer representatives who use the Program must complete a tutorial; the employer
27 must become familiar with and comply with the manual for the Program (which is
28 lengthy); the employer must agree that in verifying employment eligibility of an employee

1 at the time of hire via the federal Form I-9 process (described above), the employer will
2 only accept documents to establish identity that contain a photograph even though other
3 employers are not so limited under federal law pursuant to 8 C.F.R. §274a.2(b)(1)(v)(B);
4 and the employer must agree not to use the Program as a pre-employment screening
5 procedure or to engage in any unlawful or discriminatory employment practice. Moran
6 Dec. Exh. C at 3-4. The MOU also provides that the federal government may terminate
7 access to the Program with 30 days' notice. *Id.* at 6.

8 The Basic Pilot Program works by comparing data submitted by employers
9 electronically to information in federal SSA and DHS databases. *See generally id.* Exh.
10 B. The system compares an employee's name, date of birth, and social security number,
11 and U.S. citizenship if the employee claimed U.S. citizenship, to SSA databases. For
12 non-U.S. citizens, DHS checks for work authorization. If the databases do not match the
13 submitted information, the Program issues a "tentative non-confirmation." An employee
14 may contest a tentative non-confirmation by contacting the federal government to resolve
15 inaccuracies in the records. If an employee does not contest the tentative non-
16 confirmation within eight federal working days, it becomes final and the employer must
17 terminate the employee. *Id.* ¶8.

18 The Basic Pilot Program has a number of problems with accuracy and capacity.
19 There are problems with tentative non-confirmation rates for foreign-born work-
20 authorized employees and U.S.-born employees and a lack of employer compliance with
21 the Program requirements, which reduces the Program's effectiveness and contributes to
22 discrimination against foreign-born employees. *Id.* Exh. G at 3. For instance, nearly one
23 in ten work-authorized non-citizens are initially categorized as not having work
24 authorization by the Program, and more than 10 percent of naturalized U.S. citizens who
25 are eventually found authorized to work initially received a tentative non-confirmation.
26 *Id.* ¶11. Moreover, records for supposedly non-U.S. citizens showed seven percent were
27 actually U.S. citizens who had not updated SSA as to their citizenship status. *Id.* Exh F at
28 ii.

1 **II. ARIZONA’S IMMIGRATION LAW**

2 Governor Janet Napolitano signed the Legal Arizona Workers Act, House Bill
3 2779, into law on July 2, 2007. Section 2 of the Act institutes draconian sanctions against
4 employers that intentionally or knowingly employ an unauthorized alien and requires
5 employers to use the federal Basic Pilot Program to verify employment eligibility of their
6 employees, and becomes effective on January 1, 2008. Ariz. Rev. Stat. §§23-212(D),
7 §23-214. Under Section 3 of the Act, the Department of Revenue is to provide notice of
8 Section 2 of the Act – including its prohibitions, requirements, and sanctions – to every
9 employer on or before October 1, 2007.

10 **A. Intentionally Or Knowingly Employing An Unauthorized Alien**

11 Section 23-212 provides: “An employer shall not intentionally . . . or knowingly
12 employ an unauthorized alien.” Ariz. Rev. Stat. §23-212(A). An “unauthorized alien” is
13 defined as an alien who does not have the legal right to work in the U.S. under federal
14 law. Ariz. Rev. Stat. §23-211(8). An “employer” is defined as any individual or
15 organization that transacts business in Arizona, has a State license, and employs at least
16 one person for employment services in Arizona. Ariz. Rev. Stat. §23-211(4). A “license”
17 is broadly defined to include “any agency permit, certificate, approval, registration,
18 charter or similar form of authorization that is required by law” and that is issued for the
19 purposes of operating a business in Arizona. Ariz. Rev. Stat. §23-211(1), (7).

20 The Arizona Attorney General or county attorney must investigate a complaint that
21 an employer is violating the prohibition on employing an unauthorized alien by verifying
22 the work authorization of the alleged unauthorized alien with the federal government,
23 according to the procedure set forth in 8 U.S.C. §1373(c). Ariz. Rev. Stat. §23-212(B).¹
24 If upon completion of this federal inquiry the Arizona Attorney General or county

25
26 ¹ Federal law provides that the federal government “shall respond to an inquiry by
27 a Federal, State, or local government agency, seeking to verify or ascertain the *citizenship*
28 *or immigration status* of any individual within the jurisdiction of the agency for any
purpose authorized by law, by providing the requested verification or status information.”
8 U.S.C. §1373(c) (emphasis added). Section 1373(c), however, does not provide for
verification of *employment authorization* status.

1 attorney determines that the complaint regarding employing an unauthorized alien was not
2 frivolous, then he or she must notify the federal and local law enforcement agency of the
3 presence of the allegedly unauthorized alien. Ariz. Rev. Stat. §23-212(C). For all non-
4 frivolous complaints, the Act requires that the county attorney bring an action against the
5 employer. Ariz. Rev. Stat. §23-212(D). In deciding whether an employee is
6 unauthorized, the Superior Court may *only* consider the federal government’s
7 “determination” under 8 U.S.C. §1373(c), even though that “determination” is deemed to
8 create a “rebuttable presumption of the employee’s lawful status” (Ariz. Rev. Stat. §23-
9 212(H)), and even though §1373(c) does not concern work eligibility.

10 There are several state-created employer sanctions for an employer that
11 intentionally or knowingly employs unauthorized aliens under the Act, including: (i) the
12 employer is placed on probation for the first violation – for three years for a knowing
13 violation and five years for an intentional violation – during which time the employer
14 must file quarterly reports of new employees hired (Ariz. Rev. Stat. §23-212(F)(1)(b),
15 (2)(b)), and (ii) all of the employer’s licenses may be suspended for a knowing violation;
16 must be suspended for an intentional violation; and, upon a second violation of any type
17 during the probation period, must be permanently revoked (Ariz. Rev. Stat. §23-
18 212(F)(1)(d), (2)(c), (3)). Governor Napolitano described this scheme as providing “the
19 most aggressive action in the country” and described the mandatory license-revocation as
20 a “business death penalty.” Moran Dec. Exh. E.

21 **B. Verification Of Work Status Through The Basic Pilot Program**

22 The Act also requires employers, after hiring any employee, to “verify the
23 employment eligibility of the employee through the Basic Pilot Program.” Ariz. Rev.
24 Stat. §23-214. That is, although Congress made the Program voluntary and has
25 established an expiration date of November 2008, Arizona has made the program
26 mandatory and permanent. Currently, 17,000 U.S. businesses use the Program, and only
27 half are active users. Moran Dec. ¶17. The Act will add 130,000-150,000 businesses to
28 the Program; Governor Napolitano admits that this “could strain the system.” *Id.* Exh. H.

1 **ARGUMENT**

2 A plaintiff seeking a temporary injunction must demonstrate either:

- 3 (1) a likelihood of success on the merits and the possibility of irreparable injury; or
- 4 (2) that serious questions going to the merits were raised and the balance of
- 5 hardships tips sharply in its favor. These two alternatives represent “extremes of a
- 6 single continuum,” rather than two separate tests.

6 *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999).

7 **I. PLAINTIFFS ARE VERY LIKELY TO SUCCEED ON THE MERITS**

8 Under the Supremacy Clause, Article VI, Section 2, of the U.S. Constitution,

9 federal law preempts state law if Congress so intended. *FMC Corp. v. Holliday*, 498 U.S.

10 52, 56 (1990). “Preemption may be either express or implied, and is compelled whether

11 Congress’ command is explicitly stated in the statute’s language or implicitly contained in

12 its structure and purpose.” *Id.* at 56-57 (internal quotation marks omitted).

13 Courts are especially sensitive to preemption in the immigration area for several

14 reasons. First, the U.S. Constitution itself establishes the “preeminent role of the Federal

15 Government with respect to the regulation of aliens within our borders.” *Toll v. Moreno*,

16 458 U.S. 1, 10 (1982). In addition, laws relating to foreign nationals are inextricably

17 intertwined with international relations and are therefore a particular concern of the

18 federal government. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941). Finally, there is a

19 special need for nationwide consistency in matters affecting foreign nationals, given the

20 “explicit constitutional requirement of uniformity” in immigration matters and the myriad

21 problems that would result if each of the 50 states – and each of the thousands of local

22 governments – adopted its own rules for the treatment of aliens. *Graham v. Richardson*,

23 403 U.S. 365, 382 (1971); *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (recognizing “the

24 Nation’s need ‘to speak with one voice’ in immigration matters”).

25 **A. The Prohibition On Intentionally Or Knowingly Employing An**
26 **Unauthorized Alien Is Preempted By Federal Immigration Law**

27 The Legal Arizona Workers Act’s prohibition on intentionally or knowingly
28 employing an unauthorized alien is preempted because it attempts to regulate in an area of

1 law already governed by federal law and conflicts with federal law and policy. We
2 address express and implied preemption in turn.

3 **1. Express Preemption**

4 In 1986, Congress amended the INA by enacting IRCA, which for the first time
5 instituted sanctions for employers who employ unauthorized aliens or employ individuals
6 without complying with the new federal verification procedure. 8 U.S.C. §1324a. IRCA
7 contains an express preemption provision: “The provisions of this section preempt any
8 State or local law imposing civil or criminal sanctions (other than through licensing and
9 similar laws) upon those who employ, or recruit or refer for a fee for employment,
10 unauthorized aliens.” 8 U.S.C. §1324a(h)(2). The portion of the Act that regulates
11 intentionally or knowingly employing an unauthorized alien is expressly preempted unless
12 the Act falls within this savings clause exception for “licensing and similar laws.”

13 Defendants may argue that because the Act suspends or revokes various legal
14 instruments that the Act defines as “licenses,” it is a “licensing law.” That reading would
15 do violence to the wording of the federal statute and make a mockery of Congress’ intent.
16 First, the definition of “license” (Ariz. Rev. Stat. §23-211(7)) includes articles of
17 incorporation, certificates of partnership, partnership registrations, and articles of
18 organization. But a “license” is not ordinarily understood to extend to a basic organizing
19 document. Second, the Act imposes sanctions beyond those based on so-called licenses,
20 such as requiring employers to file reports of each employee hired and to sign affidavits
21 stating that they have terminated the employment of all unauthorized aliens. Ariz. Rev.
22 Stat. §23-212(F)(1)(b), (c), (2)(b), (d). Finally, and crucially, Congress could not have
23 intended to allow states to impose a “business death penalty” on employers through a
24 parenthetical exception to a sweeping express preemption provision that outlawed any
25 other civil or criminal sanctions, no matter how slight the penalties.

26 Another district court – faced with a law that, like here, sanctioned employing an
27 unauthorized alien by suspending the employer’s business permit – has rejected that law.
28 The court found that IRCA’s express preemption provision does not allow localities to

1 “impose any rule they choose on employers with regard to hiring illegal aliens as long as
2 the sanction imposed is to force the employer out of business by suspending its business
3 permit – what we could call the ‘ultimate sanction.’” *Lozano II*, 2007 WL 2163093, at
4 *30. As the court found, Congress did not intend to permit localities to provide only the
5 “ultimate sanction” and not other, lesser, penalties. “Such an interpretation renders the
6 express preemption clause nearly meaningless.” *Id.* Rather, the court found that
7 Congress intended the licensing savings clause to allow state and local entities only to
8 suspend the permit of employers that violate *federal* employer sanctions, not employers
9 who violate a state or local law. *Id.* at *29-32.

10 This common-sense reading of the statute is buttressed by IRCA’s legislative
11 history. The House Report states that IRCA was “not intended to preempt or prevent
12 lawful state or local processes concerning the suspension, revocation or refusal to reissue
13 a license *to any person who has been found to have violated the sanctions provision in*
14 *this legislation.*” H.R. Rep. No. 99-682(I), at 58 (1986), 1986 USCCAN 5649, 5662
15 (emphasis added). The Legal Arizona Workers Act, however, does not turn on IRCA’s
16 violation, but violation of the State Act. Congress has expressly preempted such laws.

17 2. Implied Preemption

18 Even were there no express preemption, the doctrine of implied preemption would
19 require invalidating the Act’s prohibition on intentionally or knowingly employing an
20 unauthorized alien. State laws regarding immigration and foreign nationals are impliedly
21 preempted “where the scope of the federal law at issue indicates that Congress intended
22 federal law to occupy the field exclusively or where state or local laws conflict with
23 federal laws.” *Lozano II*, 2007 WL 2163093, at *32 (internal quotation marks omitted).²

24 a. Field Preemption

25 The federal government has comprehensively legislated both generally in the area
26 of immigration (INA, 8 U.S.C. § 1101, *et seq.*), and specifically with respect to employer

27
28 ² The doctrine of implied preemption applies even where a state law falls within a savings clause. *E.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000).

1 sanctions and harboring of undocumented aliens (IRCA, 8 U.S.C. §§1324a-1324b).
2 Indeed, the Supreme Court has held that IRCA is a “comprehensive scheme” prohibiting
3 employment of unauthorized workers. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535
4 U.S. 137, 147 (2002). Extensive federal law makes it unlawful to knowingly hire an
5 unauthorized alien (8 U.S.C. §1324a(a)(1)(A)); sets up good faith defenses (8 U.S.C.
6 §1324a(a)(3), (b)(6)); creates antidiscrimination protections (8 U.S.C. §1324b);
7 establishes a detailed federal employment verification system (8 U.S.C. §1324a(b)(1));
8 and provides for civil fines and criminal penalties (8 U.S.C. §1324a(e)(4), (f)(1)) after a
9 hearing before a federal administrative law judge and an opportunity for appeal (8 U.S.C.
10 §1324a(e)(2)-(3), (7)-(8)). It is inconceivable given the care that Congress took in
11 crafting its employment verification scheme that Congress left it to every state and
12 locality to come up with its own version of the scheme.

13 Hence, the district court in *Lozano II* concluded “IRCA occupies the field to the
14 exclusion of State or local laws regarding employers hiring, employing, recruiting or
15 referring for a fee for employment unauthorized aliens.” *Lozano II*, 2007 WL 2163093,
16 at *34. Congress has left no room for Arizona to enact its own versions of such laws.
17 But Arizona has legislated in precisely the field in which Congress meant to occupy
18 exclusively. This attempt is preempted.

19 b. Conflict Preemption

20 If a state law “burdens or conflicts in any manner with any federal laws or
21 treaties,” then it is preempted. *DeCanas v. Bica*, 424 U.S. 351, 358 (1976). Under
22 conflict preemption, a state law is preempted if it ““stands as an obstacle to the
23 accomplishment and execution of the full purposes and objectives of Congress.”” *English*
24 *v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Hines*, 312 U.S. at 67). When a
25 state attempted to enforce an alien registration scheme, the Supreme Court explained that
26 “where the federal government, in the exercise of its superior authority in this field, has
27 enacted a complete scheme of regulation and has therein provided a standard for the
28 registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict

1 or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary
2 regulations.” *Hines*, 312 U.S. at 66-67. The same is true for state schemes designed to
3 prohibit employing unauthorized aliens. *See, e.g., Rogers v. Larson*, 563 F.2d 617, 626
4 (3d Cir. 1977) (invalidating Virgin Islands employer sanctions scheme and ruling that
5 “[b]ecause of the different emphasis the [Virgin Islands and federal employment]
6 schemes place on the purposes of job protection and an adequate labor force, we conclude
7 that [the Virgin Islands statute] stands as an obstacle to the accomplishment and
8 execution of the full purposes and objectives of the INA”).

9 The Legal Arizona Workers Act poses significant obstacles to the accomplishment
10 and execution of the full purposes and objectives of Congress. First, the Act conflicts
11 with federal law by requiring the verification of individuals who are excepted from the
12 federal scheme. The Act’s broad definition of “employee” (Ariz. Rev. Stat. §23-211(3))
13 includes workers such as independent contractors and casual domestic employees, even
14 though federal law imposes no requirement to verify the status of such workers. 8 C.F.R.
15 §274a.1(f), (h), (j); *see also* H.R. Rep. 99-682(I), at 57, 1986 USCCAN at 5661 (“It is not
16 the intent of this Committee that sanctions would apply in the case of casual hires.”);
17 *accord Lozano II*, 2007 WL 2163093, at *37. Nor does the Act exempt employees hired
18 before November 6, 1986, even though such employees are grandfathered under IRCA.
19 Section 101(a)(3), Pub. L. No. 99-603 (1986); 8 U.S.C. §1324a note.

20 Second, the Act sets forth a wildly differing, and much more severe, system of
21 penalties than federal law, and fails to include any countervailing anti-discrimination
22 provisions. Congress carefully calibrated the penalties in federal law and accompanied its
23 sanctions provisions with strong antidiscrimination measures, because it was understood
24 that a consequence of penalties for employers who employ unauthorized workers is to
25 increase the incentive for employers to fire or refuse to hire members of minority groups
26 in the belief that this will help avoid liability. *See, e.g.,* H.R. Rep. 99-682(II), at 12
27 (1986), 1986 USCCAN 5757, 5761. Accordingly, Congress created a gradual scale of
28 civil penalties. 8 U.S.C. § 1324a(e)(4). Possible criminal penalties are reserved for

1 “pattern or practice” violators. 8 U.S.C. § 1324a(f). Congress also instituted extensive
2 anti-discrimination provisions. 8 U.S.C. § 1324b (prohibiting discrimination in
3 employment on basis of national origin). Indeed, Congress explicitly linked the employer
4 verification provisions to the antidiscrimination provisions by forcing the latter to expire
5 if the employer sanction provisions were repealed. 8 U.S.C. §1324b(k).

6 In contrast, the cost of even a temporary suspension under the Act – much less a
7 complete shutdown – would frequently exceed the federal limits. And Arizona’s Act
8 lacks an anti-discrimination clause. Governor Napolitano admits that the Act attempts to
9 impose “the most aggressive action in the country.” Moran Dec. Exh. E. But the State
10 may not “use an iron fist where the [federal government] has consistently chosen kid
11 gloves.” *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427 (2003). This upsets the
12 balance that Congress has struck. *See Lozano II*, 2007 WL 2163093, at *38 (ordinance
13 “has no anti-discriminatory provisions, and this omission represents another conflict”).

14 Third, under Arizona’s Act, the process afforded to employers and employees falls
15 far short of the process that Congress granted. Under IRCA, a violation is found only
16 after an administrative law judge with expertise in immigration matters determines, “upon
17 the preponderance of the evidence received,” including any witnesses and production of
18 evidence, that the violation had occurred. 8 U.S.C. §1324a(e)(2), (3)(C). An employer
19 can appeal this order and seek judicial review. 8 U.S.C. §1324a(e)(7)-(8). Yet, the Act
20 allows a violation to be found after inquiry to the federal government pursuant to 8 U.S.C.
21 §1373(c) – even though §1373(c) does not refer to a federal determination of work status
22 – and prosecution in state court. Ariz. Rev. Stat. §23-212(B), (D), (F), (H). Employers
23 and employees are not given any notice or opportunity to challenge the federal
24 government’s response to an inquiry regarding work status. Although the Act states that
25 the federal government’s determination creates only a “rebuttable presumption” (Ariz.
26 Rev. Stat. §23-212(H)), it is unclear how that determination can be rebutted. The
27 interpretation and application of federal immigration law is an exclusively federal matter,
28 and the Act itself recognizes this by providing that “[o]n determining whether an

1 employee is an unauthorized alien, the court shall consider *only* the federal government’s
2 determination.” Ariz. Rev. Stat. §23-212(H) (emphasis added). But the Act does not
3 provide for (nor could Arizona require) any federal determination, after full process as
4 required in 8 U.S.C. §1324a(e), of a violation. This insufficient process means employers
5 who may not be found in violation of IRCA could be found liable under the Act.

6 Fourth, although Congress was concerned about imposing undue burdens on
7 employers (H.R. Rep. 99-682(I), at 56, 90, 1986 USCCAN at 5660, 5694), the Arizona
8 complaint process unnecessarily burdens employers by effectively lowering the bar for
9 initiating investigations and finding violations. Under the Act, employers may have to
10 defend themselves against state prosecution even when the federal government has not
11 acted and will not act. *Any* complaint under the Act will result in an investigation, and all
12 non-frivolous complaints will result in court action. Ariz. Rev. Stat. §23-212(B), (D). In
13 contrast, under IRCA, only complaints “which, on their face, have a substantial
14 probability of validity” or other violations “as the Attorney General determines to be
15 appropriate” are investigated. 8 U.S.C. §1324a(e)(1).

16 Finally, the Act burdens federal resources. *See Garrett v. City of Escondido*, 465
17 F.Supp.2d 1043, 1057 (S.D. Cal. 2006) (discussing conflict preemption based on burden).
18 Every complaint under the Act triggers an inquiry to the federal government (Ariz. Rev.
19 Stat. §23-212(B)), and will consume federal resources. Likewise, the Act makes use of
20 the voluntary Basic Pilot Program a “rebuttable presumption” that the employer did not
21 intentionally or knowingly employ an unauthorized alien. Ariz. Rev. Stat. §23-212(I).
22 This will cause significant increased use of the Program. Moran Dec. Exh. H.

23 For all of these reasons, the Act’s provisions on intentionally or knowingly
24 employing an unauthorized alien are conflict preempted.

25 **B. The Requirement To Use The Voluntary Basic Pilot Program Is**
26 **Preempted By Federal Immigration Law**

27 The Legal Arizona Workers Act states that employers, after hiring an employee,
28 “shall verify the employment eligibility of the employee through the Basic Pilot

1 Program.” Ariz. Rev. Stat. §23-214. This requirement is invalid under both conflict and
2 field preemption. By requiring employers to use a program that Congress designated
3 voluntary, Arizona adopted a law that “burdens or conflicts . . . with . . . federal laws”
4 (*DeCanas*, 424 U.S. at 358), and for the same reason, regulated in an area where
5 Congress sought to oust state power, and is field preempted. *See English*, 496 U.S. at 79
6 n.5 (“[F]ield pre-emption may be understood as a species of conflict pre-emption: A state
7 law that falls within a pre-empted field conflicts with Congress’ intent . . . to exclude state
8 regulation.”).

9 Congress designated the Basic Pilot Program as a voluntary, experimental program
10 to be implemented by the Secretary of Homeland Security. IIRIRA, §402(a) (providing
11 that “any person or other entity that conducts any hiring (or recruitment or referral) . . .
12 *may elect* to participate in that pilot program,” but Secretary “*may not require* any person
13 or other entity to participate in a pilot program”) (emphases added). 8 U.S.C. §1324a
14 note. In contrast, the Arizona Act mandates that employers use the federal Basic Pilot
15 Program. This, even though the Program has problems with accuracy. *E.g.*, Moran Dec.
16 ¶¶10–11. A recent federal study found an error rate across the board of four percent. *Id.*
17 Exh. F at ii. Error rates for naturalized citizens and non-citizens are much higher. *Id.*
18 ¶11. These and other problems show Congress’ wisdom in making the Program voluntary
19 and temporary. The attempt to force employers to use the Program is incompatible with
20 federal law. Congress could not have intended the use of the Basic Pilot Program to be
21 mandatory within some states while it continues to be in its experimental and evaluative
22 stage. *See Lozano II*, 2007 WL 2163093, at *37 (finding preempted ordinance making
23 participation in Basic Pilot Program mandatory).

24 Making the Program mandatory imposes significant burdens on employers, who
25 will need to learn how to use the Program; go through the registration process for the
26 Program, including signing a MOU with DHS and SSA; become familiar with and
27 comply with the lengthy manual for the Program; provide a tutorial for all employer
28 representatives who use the Program; install software; and use the Program for all new

1 hires. Moran Dec. ¶¶7, 19 & Exh. C. Moreover, the MOU requires that the employer
2 agree that in verifying employment eligibility of an employee, the employer will only
3 accept documents to establish identity that contain a photograph – although other
4 employers are not so limited under 8 C.F.R. §274a.2(b)(1)(v)(B). Moran Dec. Exh. C at
5 3. By making these requirements and limitations mandatory, the Act does something that
6 Congress specifically decided not to do in making the Program voluntary. The MOU also
7 provides that the federal government may terminate access to the Program with 30 days’
8 notice (*id.* at 6), and the authorizing statute provides that the Program will terminate in
9 2008 (Pub. L. No. 108-156). There is a basic incompatibility in Arizona making the
10 Program mandatory and permanent when the federal government may terminate an
11 employer’s access and when the Program will soon cease to exist absent federal action.

12 The Arizona Act could also strain the federal system by using the Basic Pilot
13 Program in an unanticipated manner. *See Garrett*, 465 F.Supp.2d at 1057. The Act will
14 increase use of the Program about ten-fold by adding 130,000 to 150,000 new businesses.
15 Moran Dec., Exh. H. In light of this drastic increase, even Governor Napolitano has cast
16 doubt on the ability of the system to handle the volume of usage resulting from the
17 Arizona law. *Id.* This concern is well-founded. Moran Dec. ¶17 & Exh. B at 8-9.
18 Indeed, many other states and localities might follow Arizona’s lead if the Act were
19 upheld, and the cumulative effect could destroy the effectiveness of the system.

20 **II. THE BALANCE OF HARMS TIPS SHARPLY IN PLAINTIFFS’ FAVOR**

21 Because plaintiffs have shown such a high likelihood of prevailing on the merits,
22 the requisite showing of harm is diminished. *E.g., Walczak*, 198 F.3d at 731. In this
23 context in particular, it makes no sense to allow Arizona to implement and enforce an
24 unconstitutional law with all the associated disruption, burden, and cost – and then to
25 require the State to return to the status quo ante, with more disruption, burden, and cost.

26 **A. Irreparable Harm**

27 Implementation of the Act will cause irreparable harm to both employers and
28 employees. *Cf. Lozano I*, 459 F.Supp.2d 332 (issuing TRO against law that required

1 tenants to obtain proof of legal citizenship or residence and prohibited employers from
2 employing undocumented aliens); *Garrett v. Escondido*, 465 F.Supp.2d 1043 (issuing
3 preliminary injunction against law that prohibited renting to undocumented aliens).

4 First, enforcement of a statute that violates the Supremacy Clause itself constitutes
5 irreparable harm. *Mattox v. Trans World Airlines*, 897 F.2d 773, 784 (5th Cir. 1990); *see*
6 *also Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992) (discussing lack of
7 adequate legal remedy when enforcement actions of preempted regulations are imminent).

8 Second, once the State sends out notices of the Act by October 1, employers will
9 begin to go through the burden of learning how to use and registering for the Basic Pilot
10 Program so that the system will be in place by January 1. *E.g.*, Dec. of Edmundo Hidalgo
11 (“Hidalgo Dec.”) ¶13. Some workers who are eligible for employment, particularly
12 foreign-born workers, will be terminated out of fear of sanction. Moran Dec. ¶16. And
13 organizations will have to divert resources to assist such employees. Hidalgo Dec. ¶16.

14 Third, as of January 1, 2008, the above harms will continue and additional harms
15 will occur as well. Employers and employees will be faced with state prosecution when
16 the federal inquiry procedure makes a mistake. Employers will terminate employees
17 based on errors in the database even though those employees are authorized to work. *See*
18 Moran Dec. ¶14. This harms both employers and employees as employees lose their jobs
19 and employers lose good workers. Moreover, employees who are authorized to work will
20 have difficulties resolving problems in the databases. *Id.* ¶12. These injuries are
21 irreparable because they will not be compensated if the law is invalidated.

22 Finally, Arizona’s intrusion into the uniquely federal field of immigration will
23 cause great harm to national immigration law and policy and burden on the federal
24 government. It is common-sense that federal immigration law will be further weakened if
25 other states and local governments are emboldened by Arizona to establish piecemeal
26 immigration standards and procedures across the country. Moreover, Arizona threatens
27 the functioning of the Basic Pilot Program. The State concedes that the Act will add
28 130,000-150,000 businesses to the Program, and “could strain the system.” *Id.* Exh. H.

1 Dated: September 6, 2007

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21 Attorneys for Plaintiffs
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23
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27
28

1 I hereby certify that the foregoing Motion
2 for Preliminary Injunction and
3 Memorandum of Points and Authorities and
4 the accompanying Declaration of Edmundo
5 Hidalgo in Support of Preliminary
6 Injunction, Declaration of Tyler Moran in
7 Support of Preliminary Injunction, and
8 [Proposed] Order Granting Motion for
9 Preliminary Injunction will be served by
10 electronic mail on this 6th day of September,
11 2007, to:

12
13 Mary O'Grady
14 Solicitor General
15 Arizona Attorney General's Office
16 1275 W. Washington Street
17 Phoenix, AZ 85007
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19
20 And will be delivered as a courtesy hard
21 copy to:

22
23 The Honorable Michelle H. Burns

24
25 
26
27
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