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10 **IN THE UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**

12 ARIZONA CONTRACTORS
13 ASSOCIATION, INC., an Arizona non-
14 profit corporation, *et al.*,

15 Plaintiffs,

16 v.

17 JANET NAPOLITANO, *et al.*,

18 Defendants.

19 CHICANOS POR LA CAUSA, INC.; and
20 SOMOS AMERICA,

21 Plaintiffs,

22 v.

23 JANET NAPOLITANO, *et al.*,

24 Defendants.

No. CV07-01355-PHX NVW
No. CV07-01684-PHX NVW
Consolidated

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTIONS FOR
PRELIMINARY INJUNCTION
AND SUPPLEMENTAL BRIEFS**

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1 Defendants Arizona Governor Janet Napolitano, Attorney General Terry Goddard,
2 and Department of Revenue Director Gale Garriott¹ (collectively, the State) file this
3 response opposing the relief that Plaintiffs have requested in their motions for
4 preliminary injunction and supplemental briefing. This response is supported by the
5 following Memorandum of Points and Authorities.

6 MEMORANDUM

7 I. Introduction.

8 These lawsuits attempt to block any effort to implement HB 2779, Arizona's
9 new State law that authorizes sanctions against employers that knowingly or
10 intentionally hire unauthorized aliens ("the Act").² The State has not had the
11 opportunity to begin enforcing this law because it does not authorize any enforcement
12 actions for violations occurring before January 1, 2008.

13 For the reasons set forth in Defendants' Motions to Dismiss (dkt 31, 38),
14 Plaintiffs' effort to prevent the Act's implementation should fail because Plaintiffs do
15 not present a justiciable controversy. Because the issues of standing and ripeness have
16 been briefed in the Motions to Dismiss, those issues are not addressed in this response
17 unless there are standing or ripeness issues unique to a particular claim. This Brief will
18 also not restate the Eleventh Amendment defense to the claims against the Governor
19 and to all claims against the Basic Pilot (now, E-Verify) requirement in A.R.S. § 23-
20 214 that were addressed in the Motions to Dismiss. (*See* Dkt 31 at 14 n.4, Dkt 38 at

21
22
23 ¹ The Chicanos Por La Causa (CPLC) Complaint named the Director of the Department
24 of Revenue as a Defendant because of the notice that the Act required his Department to
25 send to employers by October 1, 2007. (CPLC Complaint [Docket 2:07 CV-01684
26 ("CPLC dkt")] 1) ¶ 12.) Because the Department sent that notice as the Act required, any
claim against the Director is now moot. *See* Ex. 1 (declaration of Anthony Forschino).

27 ² An "unauthorized alien" is "an alien who does not have the legal right or authorization
28 under federal law to work in the United States as described in 8 United States Code
Section 1324a(h)(3)." A.R.S. § 23-211(8).

1 14.) The Court need not reach all of the issues raised in this brief if it accepts all or part
2 of the arguments made in Defendants' Motions.

3 The standard for facial constitutional challenges provides the framework for
4 resolving Plaintiffs' claims. In a facial challenge to legislation, Plaintiffs have the
5 burden of establishing that "no set of circumstances exists under which [the statute]
6 would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). A facial
7 challenge is the "most difficult challenge to mount successfully." *Salerno*, 481 U.S. at
8 745. As explained below, Plaintiffs cannot meet their burden here.³

9 **II. Summary of Argument.**

10 The central claim in this litigation concerns whether federal law preempts the
11 Act. There are two distinct provisions in the Act that are the subject to the preemption
12 challenge. First, Plaintiffs challenge A.R.S. § 23-212, which authorizes sanctions
13 against employers that knowingly or intentionally employ unauthorized aliens. Second,
14 Plaintiffs claim that federal law preempts the E-Verify requirement in A.R.S. § 23-214.

15 Federal law does not preempt the employer sanctions in A.R.S. § 23-212
16 because Congress has expressly stated to the contrary, in 8 U.S.C. § 1324a(h)(2) when
17 it intentionally carved out a licensing exception for state legislation. Because HB 2779
18 was specifically crafted to fall within this licensing exception, plaintiffs' preemption
19 claims must fail as a matter of law. Moreover, there is also no conflict preemption
20 because Arizona's law is consistent with the limitations in § 1324a(h)(2) and the
21 broader purposes of federal immigration law.

22 Plaintiffs' claim that Congress preempted Arizona's E-Verify requirement also
23 fails. Requiring employers in Arizona to use the E-Verify system does not create any
24 conflict with the legislation governing the program. Although federal law does not

25
26
27 ³Because the preliminary injunction issues have been consolidated with the trial on the
28 merits, this brief does not address the balance of harms, which is relevant only at the
preliminary injunction phase.

1 mandate E-Verify nationally, nothing in the relevant federal statutes precludes a State
2 from requiring employers within its boundaries to use the federal verification system.

3 Plaintiffs also assert that the Act violates procedural due-process requirements,
4 but this claim fails because the Act provides notice and a hearing in State court before
5 any sanctions may be imposed against an employer.

6 The other constitutional claims are asserted only by the Arizona Contractor
7 Plaintiffs, and these claims also fail. There is no substantive due-process violation
8 because the legislation is rationally related to a legitimate governmental purpose.
9 Plaintiffs do not assert that anything more than rational basis review of the legislation is
10 necessary. The Commerce Clause claim fails because Arizona's law affects only
11 employees who work in Arizona and, in any case, Plaintiffs do not meet the burden of
12 showing that the law cannot be constitutionally applied under any set of circumstances.
13 The Fourth Amendment claim concerning searches by federal authorities that may
14 never actually happen is plainly too speculative for judicial consideration. And, finally,
15 the separation of powers argument fails because the statute does not permit one branch
16 of government to usurp the responsibilities of another. The Legislature has made
17 policy, executive officials will implement that policy, and the judicial branch will
18 determine whether the law has been violated and impose sanctions when authorized by
19 law to do so.

20 **III. Federal Law Does Not Preempt the Act.**

21 The Supremacy Clause of the United States Constitution gives Congress the right
22 to preempt state legislation. Any analysis of state authority “begin[s] with the axiom that,
23 under our federal system, the States possess sovereignty concurrent with that of the
24 Federal Government, subject only to limitations imposed by the Supremacy Clause.”
25 *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). In a preemption analysis, courts do not infer
26 that “Congress ha[s] deprived the States of the power to act.” *Madeira v. Affordable*
27 *Housing Found., Inc.*, 469 F.3d 219, 238 (2d Cir. 2006) (quoting *N. Y. Tel. Co. v. N. Y.*
28 *State Dep’t of Labor*, 440 U.S. 519, 540 (1979)). Courts “start with the assumption that
the historic police powers of the States were not to be superseded by the Federal Act

1 unless that was a clear and manifest purpose of Congress.” *Medtronic, Inc. v. Lohr*, 518
2 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230
3 (1947)). The intent of Congress is the “touchstone” of any preemption analysis, *Retail*
4 *Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963), and there is generally a
5 “strong presumption against finding that state law is preempted by federal law,” *Comm.*
6 *of Dental Amalgam Mfrs. & Distribs. v. Straton*, 92 F.3d 807, 811 (9th Cir. 1996).

7 There are two broad categories of preemption—express preemption and implied
8 preemption. *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (plurality
9 opinion). The landmark United States Supreme Court case concerning implied
10 preemption of state laws that involve the employment of undocumented immigrants is
11 *DeCanas v. Bica*, 424 U.S. 351 (1976). In that case, the Supreme Court concluded that
12 federal law did not preempt a California statute prohibiting employers from hiring aliens
13 who were not entitled to lawful residence in the United States if the employment would
14 adversely affect lawful resident workers. In concluding that the state law was not
15 preempted, the Court addressed whether it (1) attempted to regulate immigration; (2)
16 regulated in an area in which the federal government had occupied the field; and (3)
17 conflicted with federal law. *DeCanas*, 424 U.S. at 358-64. Although *DeCanas* was
18 decided before Congress enacted the federal employer sanctions in 8 U.S.C. § 1324a, its
19 analysis establishes the framework for implied preemption analysis in the immigration
20 context, and the Supreme Court has never modified the case’s holding.

21 Plaintiffs’ arguments that federal law preempts the Act have no merit because they
22 are based on an erroneous reading of federal law and ignore the established standards that
23 apply to preemption challenges.⁴

24
25 ⁴ Plaintiffs’ do not argue that the Act regulates immigration. The regulation of
26 immigration “is essentially a determination of who should or should not be admitted into
27 the country, and the conditions under which a legal entrant may remain.” *DeCanas*, 424
28 U.S. at 355; see also *Equal Access to Educ. v. Merten*, 305 F. Supp. 2d 585, 602 (E.D. Va.
2004) (only the federal government may create standards to determine who is and is not
in the country legally).

1 **A. Federal Law Does Not Preempt the Sanctions Provided in A.R.S. § 23-**
2 **212.**

3 **1. Federal Law Does Not Expressly Preempt Arizona’s Sanctions Against**
4 **Employers that Knowingly or Intentionally Employ Unauthorized**
5 **Aliens.**

6 The express-preemption analysis centers on 8 U.S.C. § 1324a(h)(2), which
7 provides:

8 “The provisions of this section preempt any state or local law
9 imposing civil or criminal sanctions (*other than through*
10 *licensing and similar laws*) upon those who employ, or recruit
11 or refer for a fee for employment, unauthorized aliens.”

12 (*Emphasis added.*)

13 The Act does not impose any civil or criminal sanctions that § 1342a(h)(2)
14 precludes. Consistent with federal law, it mandates dismissal of unauthorized aliens and
15 provides for the suspension or revocation of business licenses under certain
16 circumstances. A.R.S. § 23-212(F).

17 The Act’s general definition of “license” is “any agency permit, certificate,
18 approval, registration, charter or similar form of authorization that is required by law and
19 that is issued by any agency for the purposes of operating a business in this state.” A.R.S.
20 § 23-211(7). The definition specifically includes articles of incorporation; certificates of
21 partnership, partnership registration, or articles of organization; grants of authority issued
22 under title 10, chapter 15; and transaction privilege tax licenses. *Id.* It also specifically
23 excludes licenses issued under title 45 (governing water) and title 49 (governing the
24 environment) and any professional licenses. *Id.* Because the Act imposes sanctions
25 “through licensing and similar laws,” § 1324a(h)(2) does not expressly preempt it and, in
26 fact, expressly excepts it from preemption.

27 Plaintiffs rely on *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa.
28 2007), to support their express preemption argument. In that case, the district court
enjoined local ordinances that prohibited the employment and harboring of
undocumented immigrants. *Id.* at 555. It concluded that federal law expressly preempted

1 the local ordinance concerning employment because federal law permitted only “state or
2 local laws dealing with ‘suspension, revocation or refusal to reissue a license’ to an entity
3 found to have violated the sanction provisions in [federal law].” *Hazelton* at 520. It
4 reached this conclusion based on language in a House Report stating that the penalties
5 “are not intended to preempt or prevent lawful state or local processes concerning the
6 suspension, revocation or refusal to reissue a license to any person who has been found to
7 have violated the sanctions provisions in this legislation.” H.R. Rep. No. 99-682(I),
8 reprinted in 1986 U.S.C.C.A.N. 5649, 5662.

9 The unambiguous statutory language, however, does not support the *Hazelton*
10 court’s interpretation. 8 U.S.C. § 1324a(h)(2) permits state sanctions through “licensing
11 and similar laws . . . upon those who employ, or recruit or refer for a fee for employment,
12 unauthorized aliens.” Nothing in the statutory language requires any prior federal action
13 against the employer before a State may impose sanctions against a license of an entity
14 that employs unauthorized aliens. The language of the statute that Congress approved,
15 not language from the House Report concerning the statute, controls. *Exxon Mobil Corp.*
16 *v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (the “authoritative statement is the
17 statutory text, not the legislative history”); *see also Hoffman Plastic Compounds, Inc. v.*
18 *NLRB*, 535 U.S. 137, 150 n.4 (2002) (describing House Report No. 99-682 as a “single
19 Committee Report from one House of a politically divided Congress” and noting that the
20 dissent’s reliance on the report “is a rather slender reed”); *Sprietsma v. Mercury Marine*,
21 537 U.S. 51, 62-63 (2002) (acknowledging that express preemption analysis focuses on
22 plain wording of statute). Based on the plain statutory language, no prior federal
23 enforcement action is necessary before a State may impose sanctions against an
24 employer’s license.

25 Even if the House Report is considered, it does not support Plaintiffs’ argument.
26 The relevant portion of the Report states:

27 [The penalties in this section] are not intended to preempt or
28 prevent lawful state or local processes concerning the suspension,
revocation or refusal to reissue a license to any person who has been
found to have violated the sanctions provisions in this legislation.

1 Further, the Committee does not intend to preempt licensing or
2 “fitness to do business laws,” such as state farm labor contractor laws
3 or forestry laws, which specifically require such licensee or
4 contractor to refrain from hiring, recruiting or referring
undocumented aliens.

5 H.R. Rep. No. 99-682(I), reprinted in 1986 U.S.C.C.A.N. 5649, 5662. Plaintiffs assume
6 that this language means that there must have been a federal proceeding before a state
7 may impose sanctions against an employment license, but the language does not say
8 that. Instead, the reference to “state or local processes” in the first part of the first
9 sentence could be read to suggest that a state or local process has “found” a violation.
10 At best, the Report’s language is ambiguous and certainly cannot justify ignoring the
11 statute’s unambiguous language.

12 The CPLC Plaintiffs also contend that Congress could not have intended to permit
13 states to impose a “business death penalty” on employers through the preemption
14 exception in § 1324a(h)(2). (CPLC Motion [CPLC dkt 5] at 8.) Similarly, the Arizona
15 Contractor Plaintiffs argue that reading § 1324a(h)(2) to permit States to enforce laws
16 imposing licensing penalties would “create havoc.” (Ariz. Contractor Motion [dkt 32] at
17 12.) The plain language of § 1324a(h)(2), however, permits States to impose sanctions
18 against employers “through licensing and similar laws.” It is difficult to imagine any
19 licensing sanctions other than suspension and revocation that Congress could have
20 intended. While the consequences of imposing sanctions through such laws may be very
21 serious, Congress explicitly left to the States the authority to make policy choices
22 regarding licensing sanctions against employers who hire unauthorized aliens. *See* 8
23 U.S.C. § 1324a(h)(2).

24 The Plaintiffs also take issue with the scope of Arizona’s definition of “license” in
25 A.R.S. § 23-211(7). They argue that articles of incorporation, certificates of partnership,
26 partnership registrations, and articles of organization are not within § 1324a(h)(2)’s
27 exception from preemption. (Ariz. Contractors Motion [dkt 32] at 12; CPLC Motion
28 [CPLC dkt 5] at 8-9.) Federal law does not define “license” for the purposes of §
1324a(h)(2) or elaborate on what “similar laws” might include. Absent a definition in

1 federal law, the Arizona Contractors Plaintiffs rely on the definition of license in *Black's*
2 *Law Dictionary*: “a [grant of] permission [] to commit some action that would otherwise
3 be unlawful.” (Ariz. Contractors Motion [dkt 32] at 12 [citing *Black's Law Dictionary*
4 938 (8th ed. 2004)]). Even under this definition, the sanctions in HB 2779 are “licensing
5 and similar laws” within 8 U.S.C. § 1324a(h)(2).

6 To incorporate under Arizona law, an entity must file articles of incorporation
7 with the Corporation Commission. A.R.S. § 10-201.⁵ Filing with the Corporation
8 Commission gives an entity the authority to do business as an Arizona corporation. *Id.*
9 Even before HB 2779's enactment, Arizona law established procedures for dissolving
10 corporations for certain violations of law through administrative or judicial proceedings.
11 A.R.S. §§ 10-1420 to -1422 (administrative dissolution); 10-1430 to -1434 (judicial
12 dissolution). Revoking the authority to operate as an Arizona corporation is consistent
13 with Congress's express authorization of state sanctions affecting “licensing or similar
14 laws.” The same is true of “a certificate of partnership, a partnership registration or
15 articles of organization under Title 29,”⁶ A.R.S. § 23-211(7)(b)(ii), and a “grant of

16
17 ⁵ The requirements regarding incorporation set forth in A.R.S. § 10-201 also apply to
18 professional corporations. *See* A.R.S. § 10-2202. Other statutes in Title 10 govern
19 various types of corporations and associations that are formed by filing articles of
20 incorporation with the Corporation Commission. *See, e.g.*, A.R.S. §§ 10-2002 (nonprofit
21 cooperative marketing associations); -2053, -2078 (electric cooperative nonprofit
22 membership corporations); -2123, 2144 (nonprofit electric generation and transmission
23 cooperative corporations); -3202, -3203 (nonprofit corporations). The articles of
24 incorporation for business development corporations are filed with the superintendent of
25 financial institutions. A.R.S. § 10-2260.

26 ⁶ Chapter 29 includes various registration information that partnerships, limited
27 partnerships, and limited liability companies must file under Arizona law. *See, e.g.*,
28 A.R.S. §§ 29-102 (“[e]very partnership transacting business in this state under a
fictitious name, or a designation not showing the names of the persons interested as
partners in the business [must] record with the county recorder . . . a certificate”
providing information regarding the members of the partnership); -308 (limited
partnerships must file a certificate of limited partnership with the Secretary of State and
are not formed under state law until the certificate of limited partnership is filed); -349
(foreign limited partnerships must file application for registration with the Secretary of

1 authority issued under Title 10, Chapter 15,”⁷ A.R.S. § 23-211(7)(b)(iii). Business
2 entities must file these documents in order to have the authority under Arizona law to
3 engage in certain conduct and to receive certain protections provided by Arizona law. In
4 that way, they are licensing laws or, at the very least, similar to licensing laws, and are
5 within the preemption exception in 8 U.S.C. § 1324a(h)(2).⁸

6 The CPLC Plaintiffs also question the State’s ability to require employers to file
7 reports regarding hiring and to submit affidavits stating that they have terminated the
8 employment of unauthorized aliens, but these remedial measures are consistent with the
9 State’s authority over its licensees. (CPLC Plaintiffs’ Motion [CPLC dkt 5] at 8.) The
10 State may require reports from entities authorized to do business in this State. *See, e.g.*,
11 A.R.S. §§ 5-104.01 (audits of permittees that the Racing Commission licenses); 6-186
12 (audit of banks); 10-1622 (corporate annual report). In addition, under federal law “the
13 employer is compelled to discharge [a] worker upon discovery of the worker’s

14 State); -635 (limited liability companies file articles of organization with Corporation
15 Commission); -802 (foreign limited liability companies obtain a certificate of registration
16 from Corporation Commission); -841.01 (professional limited liability companies file
17 articles of organization with Corporation Commission).

18 ⁷Chapter 15 of title 10 governs foreign corporations, which must register with the
19 Secretary of State before transacting business in Arizona. *See* A.R.S. § 10-1503.

20 ⁸ Plaintiffs have not established that they have standing to challenge all of the possible
21 licenses in title 10 (corporations) or any of the licenses in title 29 (partnerships). Because
22 Arizona clearly has authority to impose sanctions against licenses pursuant to 8 U.S.C. §
23 1324a(h)(2), the statute satisfies the standard for a facial challenge under *Salerno*. Any
24 challenges to a sanction against a particular license would have to be raised in an action
25 by a proper plaintiff in a justiciable controversy concerning the statute’s application to
26 that plaintiff. In addition, even if the Court accepted Plaintiffs’ argument about the scope
27 of the definition of “license,” this Court should not enjoin the entire statute because the
28 Act includes a severability clause directing that any invalid portions should be severed
from the valid provisions. *See* 2007 Ariz. Sess. Laws, ch. 279, § 5 (severability clause);
Hull v. Albrecht, 192 Ariz. 34, 39-40, 960 P.2d 634, 639-40 (1998) (acknowledging that
Arizona courts will sever unconstitutional portions of a statute if they can determine that
“(1) the valid portions are effective and enforceable standing alone and (2) the legislature
would have enacted the valid portions of the statute absent the invalid provision”).

1 undocumented status.” *Hoffman Plastic Compounds*, 535 U.S. at 148 (citing 8 U.S.C. §
2 1324a(a)(2)). The State has the authority to require reports to ensure that these
3 businesses are complying with the law.

4 For these reasons, Congress has not expressly preempted the sanctions in A.R.S. §
5 23-212.

6 **2. Congress Has Not Preempted the Field With Respect to**
7 **Sanctions Against Employers That Knowingly or Intentionally**
8 **Employ Unauthorized Aliens.**

9 Field preemption requires a demonstration that a “complete ouster of state power”
10 was “the clear and manifest purpose of Congress.” *DeCanas*, 424 U.S. at 357 (quoting
11 *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963)). A comprehensive
12 federal law does not by itself evidence congressional intent to preempt all state authority.
13 *Id.*; see also *N. Y. Dep’t of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973) (“a
14 detailed statutory scheme [relating to requiring work for welfare] was both likely and
15 appropriate, completely apart from any questions of pre-emptive intent.”).

16 In *DeCanas*, which the Supreme Court decided before the enactment of the
17 Immigration Reform and Control Act of 1986 (IRCA), the Court concluded that Congress
18 had not preempted the field concerning the employment of unauthorized aliens. 424 U.S.
19 at 357. When it enacted the IRCA and imposed federal sanctions against employers who
20 hire unauthorized aliens, Congress expressly preserved state authority to impose
21 sanctions against employers through “licensing and similar laws.” 8 U.S.C. §
22 1324a(h)(2). Given this exception from the express preemption provision, it is evident
23 that Congress did not intend to completely oust state authority. Field preemption would
24 render meaningless the clause in § 1324a(h)(2) that recognizes state authority regarding
25 licensing and similar laws as sanctions for the employment of unauthorized aliens. There
26 is a comprehensive federal scheme, but the federal scheme does not oust state policies
27 that are within the preemption exception in 8 U.S.C. § 1324a(h)(2).⁹ See *Duncan v.*

28 ⁹ As Plaintiffs point out, the district court in *Hazelton* concluded that federal law preempted the field concerning hiring, employing, recruiting unauthorized employees.

1 *Walker*, 533 U.S. 167, 174 (2001) (discussing cardinal principle of statutory construction
2 that a statute should be construed so no clause, sentence, or word is superfluous).

3 Therefore, field preemption does not apply to the sanctions in the Act.

4 **3. The Employer Sanctions in the Act Do Not Conflict with Federal Law.**

5 Conflict preemption exists when “compliance with both State and federal law is
6 impossible, or when the state law ‘stands as an obstacle to the accomplishment and
7 execution of the full purposes and objectives of Congress.’” *Mich. Cannery & Freezers*
8 *Ass’n Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984) (internal
9 quotation marks omitted). Conflict preemption is not implied absent an “actual
10 conflict.” *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990). “‘Tension between federal
11 and state law is not enough to establish conflict preemption.’” *Incalza v. Fendi N. Am.,*
12 *Inc.*, 479 F.3d. 1005, 1009-10 (9th Cir. 2007) (quoting *Silkwood v. Kerr-McGee Corp.*,
13 464 U.S. 238, 256 (1984)). In addition, “[w]here state enforcement activities do not
14 impair federal regulatory interests concurrent enforcement activity is authorized.”
15 *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (citing *Fla. Avocado*
16 *Growers v. Paul*, 373 U.S. 132, 142 (1963)), *overruled on other grounds by Hodgers-*
17 *Durgin v. de la Vina*, 199 F.3d. 1037 (9th Cir. 1999).

18 Arizona Revised Statutes § 23-212 does not conflict with any provision of federal
19 law or create an obstacle to the execution of Congress’s objectives. The statute exercises
20 the authority to impose sanctions through licensing and similar laws that Congress
21 reserved for the States in § 1324a(h)(2). In passing the federal laws prohibiting the
22 employment of unauthorized aliens, “Congress wished to stop payments of wages to
23 unauthorized workers, which act as a magnet . . . attract[ing] aliens here illegally, and to
24 prevent those workers from taking jobs that would otherwise go to citizens.” *Incalza*,
25 479 F.3d at 1011 (internal quotation marks omitted) (holding that federal immigration

26
27 (CPLC Motion [CPLC dkt 5] at 10; Ariz. Contractors Motion [dkt 32] at 13.) Defendants
28 respectfully disagree with the district court’s analysis in *Hazelton* because it renders
meaningless the preemption exception for sanctions involving licensing and similar laws.

1 law did not preempt California employment law). Both federal law and the Act aim to
2 prohibit the employment of unauthorized aliens, and the Act accomplishes this goal
3 through sanctions that do not conflict with the relevant federal laws.

4 Plaintiffs argue that the Act conflicts with federal law in a variety of ways. They
5 complain that the penalties in this state law are more severe than the penalties in the
6 federal law. (CPLC Motion [CPLC dkt 5] at 11; Ariz. Contractors Motion [dkt 32] at 13-
7 14.) As described above, the argument that Arizona's law is more severe than the federal
8 law ignores the express preemption provision in 8 U.S.C. § 1324a(h)(2), which explicitly
9 permits State sanctions against licenses. Congress did not limit states' ability to impose
10 sanctions against employers through licensing and similar laws; it instead left states the
11 authority and discretion to adopt such sanctions through their licensing laws as they deem
12 appropriate.

13 The Arizona Contractor Plaintiffs' criticism of the Act's enhanced penalties for
14 "intentionally" employing an unauthorized alien is also unwarranted. (Ariz. Contractors
15 Motion [dkt 32] at 14.) The fact that Arizona's scheme includes more stringent penalties
16 for intentional violations creates no conflict with federal law. The Act incorporates the
17 definition of "intentionally" from Arizona's criminal law. A.R.S. § 23-211(5). That
18 definition requires evidence that the employer's "objective is to cause [the conduct
19 described in the statute] or to engage in that conduct." A.R.S. § 13-105(9)(a). The
20 requirement of a knowing violation, which is the scienter requirement in the federal law
21 (8 U.S.C. § 1324a; 8 C.F.R. § 274a.1(l)), would include intentional violations. Plaintiffs'
22 theory that federal law precludes more stringent penalties against intentional violations of
23 the law has no legal support.

24 Plaintiffs conflict preemption argument based on the lack of an explicit
25 antidiscrimination provision similar to the one in 8 U.S.C. § 1324b is also incorrect.¹⁰

26 ¹⁰ Plaintiffs correctly noted that, as a public policy matter, the Governor supports
27 an explicit anti-discrimination provision in the Act. The fact that, in her view, such a
28 provision would have improved the legislation, however, has nothing to do with the
constitutional issue before the Court.

1 (CPLC Motion [CPLC Dkt 5] at 11, Ariz. Contractors Motion [dkt 32] at 14-15)).
2 Arizonans remain protected by the prohibitions against discrimination that are included in
3 state and federal civil rights laws. *See* 8 U.S.C. § 1324b (defining and prohibiting unfair
4 immigration-related employment practices); 42 U.S.C. § 2000e-2 (prohibiting
5 discrimination based on “race, color, religion, sex, or national origin”); A.R.S. § 41-
6 1463(B) (prohibiting employment discrimination based on “race, color, religion, sex, age,
7 disability or national origin”). Despite the lack of an express antidiscrimination provision
8 analogous to § 1324b, the Act provides that it “shall not be construed to require an
9 employer to take any action that the employer believes in good faith would violate federal
10 or state law.” A.R.S. § 23-213. The failure to include an additional antidiscrimination
11 provision in the Act neither conflicts nor in any way burdens compliance with federal
12 law.¹¹

13 Similarly, Plaintiffs’ argument that the Act conflicts with federal law because of
14 the different procedures used to determine whether to impose sanctions has no merit.
15 (CPLC Motion [CPLC dkt 5] at 12.) The State procedures in the Act do not in any way
16 create an actual conflict with federal law or an obstacle to compliance with federal law.
17 The preemption doctrine does not require that state laws replicate federal laws and
18 procedures. Plaintiffs assert that the different procedures could result in an employer
19 being found in violation of the state law but not the federal law. But even if true, that
20 possibility does not establish conflict preemption. Any time that two different decision
21 makers are involved, there is a possibility of different outcomes. That is simply a result
22 that sometimes occurs in a federalist system. But, particularly where Congress
23 specifically preserved state authority to impose sanctions through State licensing laws as
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26
27 ¹¹ Although the *Hazelton* court concluded that the lack of an antidiscrimination provision
28 in the local ordinance created a conflict with federal law, *Hazelton*, 496 F. Supp. 2d at
529, this Court should not follow the *Hazelton* decision.

1 Arizona is doing through the Act, the possibility of different outcomes does not mean the
2 state action is preempted.

3 The Plaintiffs' purported concern that the Act's enforcement provisions will
4 overburden the federal government also is no reason to enjoin the Act. (CPLC Motion
5 [CPLC dkt 5] at 13; Ariz. Contractors Motion [dkt 32] at 19.) Federal law requires that
6 federal officials respond to State and local inquiries concerning immigration status:

7 The Immigration and Naturalization Service shall respond to
8 an inquiry by a Federal, State, or local government agency,
9 seeking to verify or ascertain the citizenship or immigration
10 status of any individual within the jurisdiction of the agency
for any purpose authorized by law, by providing the requested
verification or status information.

11 8 U.S.C. § 1373(c).

12 That statute also provides that federal, state and local governments "may not
13 prohibit, or in any way restrict, any government entity or official from sending to, or
14 receiving from, the Immigration and Naturalization Service information regarding the
15 citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. §
16 1373(a); *see also* 8 U.S.C. § 1644 (prohibiting States and local governments from being
17 prevented from exchanging information with federal authorities regarding the
18 immigration status of individuals). Congress has plainly encouraged state and federal
19 authorities to communicate regarding immigration issues as part of a nationwide effort to
20 enforce federal immigration laws. The fact that the Act may result in additional inquiries
21 to the federal government is actually consistent with federal law, which encourages local
22 agencies to communicate with federal authorities regarding immigration status. At a
23 minimum, the Act does not conflict in any way with federal law.

24 To support their argument concerning the additional burden on the federal
25 government, Plaintiffs rely on *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D.
26 Cal. 2006). (CPLC Motion [CPLC dkt 5] at 13; Ariz. Contractors Motion [dkt 32] at 19.)
27 In *Garrett*, the district court granted a temporary restraining order preventing the City of
28 Escondido from enforcing an ordinance directed at preventing landlords from harboring

1 illegal immigrants. *Garrett*, 465 F. Supp. 2d at 1047. Although the district court was
2 concerned about the burden on the federal authorities, it was also concerned that the
3 ordinance would be implemented using the Systematic Alien Verification for
4 Entitlements (SAVE) program, which was developed to determine eligibility for public
5 benefits. *Id.* at 1057. To the extent that *Garrett* suggests that an increase in
6 communications between state and federal authorities regarding immigration status
7 conflicts with federal law, its reasoning is flawed because it ignores the federal laws
8 encouraging communications as well as the caselaw setting a high burden to establish
9 conflict preemption. *See, e.g.*, 8 U.S.C. § 1373 (communications between state and
10 federal authorities regarding immigration status); *Michigan Cannery & Freezers Ass'n v.*
11 *Agricultural Mktg. & Bargaining Bd.*, 467 U.S. at 469 (explaining that for conflict to
12 exist, compliance with both state and federal law must be impossible or state law must be
13 “an obstacle to the accomplishments and execution of the full purposes and objectives of
14 Congress”).

15 The CPLC Plaintiffs’ concern that the Act may require “the verification of
16 individuals who are excepted from the federal scheme” is also unjustified. (CPLC
17 Motion [CPLC dkt 5] at 11.) They are concerned about extending the Act to independent
18 contractors, casual domestic employees, and employees hired before November 6, 1986.
19 (*Id.*) This claim is more appropriately resolved in a case involving one of the people who
20 allegedly are outside the reach of the federal employer sanctions requirements, rather
21 than in this facial challenge of the statute. In any case, their argument also fails as a
22 matter of statutory construction. The Act imposes sanctions only against employers that
23 knowingly or intentionally employ unauthorized aliens. *See* A.R.S. § 23-212(A). An
24 “unauthorized alien” is “an alien who does not have the legal right or authorization under
25 federal law to work in the United States as described in 8 [U.S.C.] § 1324a(h)(3).”
26 A.R.S. § 23-211(8). Under 8 U.S.C. § 1324a(h)(3) “unauthorized alien” means “with
27 respect to the employment of an alien at a particular time, that the alien is not at that time
28 either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so
employed by this chapter or by the Attorney General.” Because the Act relies on the

1 federal definition of unauthorized alien, the Act would not apply to any person who is not
2 also subject to the federal law.¹²

3 The Act's definitions of "employee" and "employer" also fail to support Plaintiffs'
4 claims regarding independent contractors and domestic workers. An "employee" is "any
5 person who performs employment services for an employer pursuant to an employment
6 relationship between the employee and employer." A.R.S. § 23-211(3). This definition
7 does not include an independent contractor. The definition of "employer" is, in part, (1)
8 "any individual or type of organization that transacts business in this state"; (2) "that has
9 a license issued by an agency in this state;" and (3) "that employs one or more individuals
10 who perform employment services in this state." A.R.S. § 23-211(4). Because domestic
11 workers would not be employed by individuals that have a state license, they also are not
12 within the Act's definition of employees.

13 Finally, the cases that Plaintiffs cite regarding conflict preemption do not support
14 the conclusion that the Act conflicts with federal law. Neither *Hines v. Davidowitz*, 312
15 U.S. 52 (1941), nor *Rogers v. Larson*, 563 F.2d 617 (3d Cir. 1977), addressed a federal
16 law that explicitly reserved authority for the States, as 8 U.S.C. § 1324a(h)(2) does. In
17 addition, both cases concerned state or local laws imposing restrictions on aliens lawfully
18 present in this country. Likewise, Plaintiffs' reliance on *Am. Insurance Ass'n v.*
19 *Garamendi*, 539 U.S. 396 (2003), is misplaced. In that case, the Supreme Court
20 concluded that federal law preempted a California statute requiring disclosure of whether
21 an insurance company had done business in Europe during the Holocaust. That case
22 concerned state legislation that directly affected American foreign policy, an area in
23 which a uniform national policy is uniquely important. *Id.* at 420. Although immigration

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25 ¹² The federal regulations address independent contractors, casual domestic
26 employees or other employees who are not subject to the federal law. *See* 8 C.F.R. §§
27 264a.1(a), (f)-(h), (j) (defining the terms "unauthorized alien", "employee", "employer",
28 "employment", and "independent contractor"); § 274a.7 (addressing application of
sanctions to employees hired before November 7, 1986).

1 is related to foreign affairs, the Supreme Court has acknowledged the important local
2 interests at stake in employment matters. As the Supreme Court stated in *DeCanas*,
3 States possess broad authority under their police powers to regulate the employment
4 relationship to protect workers within their boundaries. 424 U.S. at 356. The Court
5 noted that “[e]mployment of illegal aliens in times of high unemployment deprives
6 citizens and legally admitted aliens of jobs; [and that] acceptance by illegal aliens of jobs
7 on substandard terms as to wages and working conditions can seriously depress wage
8 scale and working conditions.” *Id.* at 356-57. In contrast, the Court considered
9 California’s interest in the legislation at issue in *Garamendi* to be “weak[.]” 539 U.S. at
10 425.

11 *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), does not support
12 Plaintiffs’ preemption claim either. *Geier* addressed whether the Department of
13 Transportation’s standard that permitted car manufacturers to choose whether to install
14 airbags preempted a common-law tort action asserting that Honda was negligent for
15 designing a car that lacked a driver’s side airbag. *Id.* at 864-65. The Court concluded
16 that “[t]he rule of state tort law for which petitioners argue would stand as an ‘obstacle’
17 to the accomplishment” of the federal objective to “gradually develop[] [a] mix of
18 alternative passive restraint devices for safety-related reasons.” *Id.* at 886. The federal
19 objective with respect to 8 U.S.C. § 1324a is to prohibit the employment of unauthorized
20 aliens, and the state objective with respect to the Act is the same. Unlike the state tort
21 claim in *Geier* that sought to impose a duty under tort law that conflicted with the duties
22 that federal law established, the duties that the Act imposes are compatible with the
23 employers’ duties under IRCA.

24 As the court noted in *Rogers*, preemption turns on an analysis of the particular
25 facts. 563 F.2d at 622. Here, an analysis of the relevant state and federal legislation
26 leads to the conclusion that federal law does not preempt the sanctions provisions in
27 A.R.S. § 23-212.¹³

28 ¹³ As part of their preemption argument, the Arizona Contractor Plaintiffs also assert that

1 **B. Federal Law Does Not Preempt Arizona’s Requirement that Employers**
2 **Use the E-Verify Program.**

3 Plaintiffs also argue that field preemption and conflict preemption bar Arizona’s
4 requirement that employers use the E-Verify system because, under federal law,
5 participation is discretionary. (CPLC Motion [CPLC dkt 5] at 13-14; Ariz. Contractors
6 Motion [dkt 32] at 16-18.) As for field preemption, although there is a comprehensive
7 regulatory scheme, there is no evidence that Congress intended to oust State policy
8 authority regarding the use of the federal employment verification system. Nothing in
9 federal law suggests that a State cannot require employers within its boundaries to
10 participate in the federal program.

11 Congress authorized demonstration projects relating to the employment
12 verification system and gave the Executive Branch the responsibility to develop these
13 programs. 8 U.S.C. § 1324a(d)(4); Pub. L. 104-208, Title IV, Subtitle A (1997) (included
14 in notes to 8 U.S.C. § 1324a). Federal law prohibits the Secretary of Homeland Security
15 from “requir[ing] any person or other entity to participate in a pilot program.” Pub. L.
16 104-208, § 402(a), 110 Stat. 3009-655, 656 (1997).

17 Although the federal law did not impose E-Verify as a requirement for all
18 employers throughout the country, nothing in the federal law prohibits a State from
19 requiring employers within its boundaries to participate in the federal verification
20 program. The CPLC Plaintiffs complain that the federal program’s future is unclear and
21 that it “will soon cease to exist absent federal action.” (CPLC Motion [CPLC dkt 5] at
22 15.) They also complain about the burden that this requirement will place on employers
23 because of the required training and the system’s error rate. (*Id.* at 14; Ariz. Contractors
24 Motion [dkt 32] at 17.) Even if accurate, and they are not, these policy concerns about
25 Arizona’s new requirement do not support federal preemption of Arizona’s law. If the
26 federal program ceases to exist, then Arizona’s requirement will also end as a practical

27 the Act conflicts with federal law because it results in a Fourth Amendment violation.
28 (Ariz. Contractors Motion [dkt 32] at 16.) Plaintiffs’ Fourth Amendment argument is
 addressed at Section VII in this Response.

1 matter because employers obviously cannot participate in a non-existent program. *See,*
2 *e.g., EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120 (1988) (statutes should
3 not lead to absurd or futile results); *Pinal Vista Prods. LLC v. Turnbull*, 208 Ariz. 188,
4 193, 91 P.3d 1031, 1036 (App. 2004) (statutes do not require futile acts).¹⁴ The
5 arguments about the burden of the E-Verify requirement and the accuracy of the program
6 address the wisdom of Arizona’s new requirement, rather than whether federal law
7 preempts the requirement.

8 The fact that this new requirement may place more of a burden on the federal
9 system simply means that more people will be using the system for the purpose for
10 which the federal government developed it. Moreover, because it has been established
11 as a discretionary program, the federal government currently does not control the
12 volume of participants.

13 Because Arizona’s E-Verify requirement creates no actual conflict with federal
14 law and does not stand as an obstacle to the execution of the federal verification system,
15 it is not preempted.

16 **IV. The Act Does Not Violate Plaintiffs’ Procedural Due Process Rights**
17 **Under Either the Federal Constitution or Arizona’s Constitution.**

18 The procedural protections in the Act and court rules easily defeat Plaintiffs’ claim
19 that the Act violates procedural due process.¹⁵ The United States Constitution provides
20 that “[no] State shall . . . deprive any person of life, liberty, or property, without due
21 process of law.” U.S. Const. amend. XIV, § 1. The Arizona Constitution provides that
22 “[n]o person shall be deprived of life, liberty, or property without due process of law.”

23 ¹⁴ These claims regarding the demise of E-Verify are also pure speculation. The Director
24 of Homeland Security has favored strengthening and expanding the program. *See* Ex. 2
25 (8/10/07 Remarks by Homeland Security Secretary Michael Chertoff). Federal
26 Authorities are also supporting Arizona and other states in their efforts to expand the use
27 of E-Verify. *See* Ex. 3 (Washington Times, “U.S. pushes E-Verify for hires” 9/25/07).

28 ¹⁵ Only the Arizona Contractor Plaintiffs assert a violation of the State Constitution.
(Ariz. Contractors’ Motion [dkt 32] at 20.)

1 Ariz. Const. art. 2, § 4. Because the Act provides for notice and a fair hearing before a
2 business license can be revoked or any sanction imposed against an employer, it does not
3 infringe on procedural due process rights under either constitution.

4 Under both the federal and state constitutions, procedural due process requires that
5 a party have an opportunity to be heard “at a meaningful time and in a meaningful
6 manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*,
7 380 U.S. 545, 552 (1965)). With respect to notice, due process requires notice that is
8 reasonably calculated under all of the circumstances to apprise interested parties of the
9 pendency of the action and afford them the opportunity to present their objections.
10 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). It also requires
11 “a fair trial in a fair tribunal.” *In re Murchison*, 349 U.S. 133, 136 (1955); *United States*
12 *v. Superior Court*, 144 Ariz. 265, 280, 697 P.2d 658, 673 (1985). The Supreme Court
13 has recognized that due process “is flexible and calls for such procedural protections as
14 the particular situation demands.” *Mathews*, 424 U.S. at 334 (quoting *Morrissey v.*
15 *Brewer*, 408 U.S. 471, 481 (1972)).

16 As Plaintiffs note, the three factors that are relevant to the procedural due process
17 analysis are: (1) the private interest affected by the action; (2) the risk of erroneous
18 deprivations through the procedures and the value of additional or substitute procedural
19 safeguards; and (3) the Government’s interest, including the function involved and the
20 administrative and fiscal business of additional or substitute procedural safeguards.
21 *Mathews*, 424 U.S. at 335. Applying the relevant factors in *Mathews v. Eldridge*, the
22 Supreme Court determined that due process did not require an opportunity for an
23 evidentiary hearing before terminating a person’s disability benefits. *Id.* at 326.
24 Plaintiffs cite no case that supports the proposition that sanctions imposed against a
25 license following a judicial proceeding violates due process.

26 The private interest at stake in an enforcement action under A.R.S. § 23-212 may
27 include suspension or, in some circumstances, revocation of a business license.¹⁶ In

28

¹⁶ A court may (but is not required to) suspend business licenses for up to ten days

1 Arizona, a business license is a property interest that cannot be revoked without due
2 process of law. *See Comeau v. Ariz. State Bd. of Dental Exam's*, 196 Ariz. 102, 106, 993
3 P.2d 1066, 1070 (App. 1999). Although a State must “guard against arbitrary action” and
4 “justify the degree of infringement” imposed on a professional license, the general right
5 to pursue a profession “is subject to the paramount right of the state under its police
6 powers to regulate business and professions” to “protect the public health, morals, and
7 welfare.” *Id.*

8 If a court makes the “ultimate decision” in a case, due process requires that a party
9 has an opportunity to be heard at some meaningful time before the court ruling but not
10 necessarily during an early or investigative stage. *See, e.g., In re Hamm*, 211 Ariz. 458,
11 123 P.3d 652 (2005). In *Hamm*, James Hamm’s application to the State Bar of Arizona
12 was denied by the State Bar’s Committee on Character and Fitness (“the Committee”).
13 Hamm argued that he was “denied due process of law because two members of the
14 Committee may have prejudged the merits of his application.” *Id.* at 468, 123 P.3d at
15 662. In denying his application to the State Bar, the Arizona Supreme Court noted that
16 the court, “not the Committee, made the ultimate decision on Hamm’s application” and
17 that Hamm received “a full opportunity to be heard before a fair tribunal.” *Id.*

18 Similarly, the Act contemplates a fair hearing and an opportunity to be heard
19 before a license can be revoked because a court of law must determine that an employer
20 “intentionally” and “knowingly” hired an unauthorized alien. Thus, substantial process
21 is in place prior to any enforcement under the statute. In this way, the Act is different
22 from the ordinance analyzed in *Lozano v. Hazelton*. Under the Hazelton ordinance, a
23 code officer determined whether or not a particular employee was an “unlawful worker,”
24 and the code officer had to suspend the business permit of any business that fails to
25 correct the violation within three days of being notified of the unlawful employment

26 following a judicial determination that the employer has knowingly employed an
27 unauthorized alien. A.R.S. § 23-212(F)(1)(d). A minimum ten day suspension is required
28 for an intentional violation of the statute. *Id.* at (F)(2)(c). A second violation results in
revocation of the employer’s licenses. *Id.* at (F)(3).

1 determination. *Hazelton*, 496 F. Supp. 2d at 535. Thus, the Hazelton ordinance allowed
2 for the ultimate sanction to be imposed without an opportunity for a hearing after a
3 determination of the employee's status and a brief waiting period.

4 In contrast, the Act's progressive sanction scheme cannot be triggered until a court
5 determines that the employer "intentionally" or "knowingly" employed the unauthorized
6 alien. The Arizona Rules of Civil Procedure require that any defendant in a civil
7 enforcement action receive notice. *See* Ariz. R. Civ. P. 4. At the court hearing, a judge
8 will consider arguments and evidence that go to essential elements of the Act. Court
9 rules also provide for appeals (Ariz. R. App. P.), stays of court orders (Ariz. R. Civ. P.
10 62), special actions (Ariz. R. P. Spec. Act.), and other procedures that give the parties to
11 any dispute many opportunities to protect their interests. The statutory provisions,
12 together with the relevant court rules, are more than sufficient to satisfy procedural due
13 process.¹⁷

14 Plaintiffs also claim that creating a rebuttable presumption concerning a person's
15 immigration status based on the information that the federal government provides
16 through 8 U.S.C. § 1373c violates due process. (*See* CPLC Supp. Br. [CPLC dkt 27] at
17 5; Ariz. Contractors Motion [dkt 32] at 23.) As Plaintiffs indicate, the information will
18 address a person's citizenship or immigration status. But, that is not enough to establish
19 a violation of the statute and impose sanctions. Before sanctions are imposed, a court
20 must determine that the employer "knowingly" or intentionally" employs unauthorized
21

22 ¹⁷ Plaintiffs' concerns should be further ameliorated by the prospect of a specific
23 court rule for these proceedings. The Director of the Arizona Administrative Office of
24 the Court has proposed a rule governing actions brought under A.R.S. § 23-212. *See*
25 R07-007 -- Petition to Add Rule 65.2, Arizona Rules of Civil Procedure (submitted
26 September 6, 2007) (attached as Ex. 4). The proposed rule, for example, specifies that
27 the parties must have the opportunity for an evidentiary hearing before a court may order
28 the suspension or revocation of any license. Proposed Rule 65.2(g). It also makes clear
that factual issues are to be determined by a preponderance of the evidence. *Id.* at (h).
The public comment on this Petition closes November 16, 2007, and the proposal
contemplates an effective date of January 1, 2008.

1 aliens. The information provided under 8 U.S.C. § 1373c is only one aspect of the State's
2 burden of proof in a case under A.R.S. § 23-212.

3 In addition, contrary to Plaintiffs' arguments, nothing precludes state courts from
4 making decisions that involve determining whether a person is an "unauthorized alien."
5 (CPLC Supp. Br. [CPLC dkt 27] at 5-6; Ariz. Contractor Motion [dkt 32] at 24.) While
6 it is true that federal courts have exclusive jurisdiction to deport a person, 8 U.S.C. §
7 1229a(a)(1), (3), nothing prevents state courts from making determinations regarding
8 whether a person is an unauthorized alien when that is relevant to issues within the
9 court's jurisdiction. Indeed, for California to implement the statute approved in
10 *DeCanas*, California courts would have been called upon to determine whether a person
11 was authorized to work in this country. *See* 424 U.S. at 353. Moreover, a person's
12 immigration status often is relevant to issues under state law, including eligibility for
13 benefits (*see e.g.*, A.R.S. § 36-2933 [AHCCCS]; 46-292 [cash assistance]), eligibility for
14 a drivers' license (A.R.S. § 28-3153(D)), and whether a person is eligible for bail, (Ariz.
15 Const. art. 2, § 22(A); *Hernandez v. Lynch*, No. 1CA-SA-07-0092 (Ariz. App. October 2,
16 2007)). Determining whether a person has knowingly or intentionally employed
17 unauthorized aliens in a state court proceeding does not violate procedural due process.

18 Plaintiffs also erroneously assert that the Act violates due process because it
19 requires county attorneys to file enforcement actions regarding all non-frivolous
20 complaints. (CPLC Supp. Br. [dkt 27] at 5.) Plaintiffs read the Act too restrictively. If a
21 county attorney or the attorney general determines that a complaint is not frivolous,
22 subsection C of A.R.S. § 23-212 requires three actions:

23 1. The attorney general or county attorney shall notify the United
24 States immigration and customs enforcement of the unauthorized
25 alien.

26 2. The attorney general or county attorney shall notify the local law
27 enforcement agency of the unauthorized alien.
28

1 3. The attorney general shall notify the appropriate county attorney
2 to bring an action pursuant to subsection D if the complaint was
3 originally filed with the attorney general.

4 Subsection D of A.R.S. § 23-212 describes who can file an enforcement action and
5 where the action is to be filed: “An action for a violation of subsection A shall be
6 brought against the employer by the county attorney in the county where the
7 unauthorized alien employee is employed.” Nothing in this statutory language requires
8 county attorneys to file enforcement actions based on every complaint that is not
9 frivolous. Even if the statute did establish such a requirement, the statute would not
10 violate due process because no sanction is imposed until after a court determines that an
11 employer has violated the statute.

12 Plaintiffs also contrast the state law with federal law to support their due-process
13 claim. (CPLC Supp. Br. [dkt 27] at 5; Ariz. Contractors Motion [dkt 32] at 25). The
14 federal law includes an administrative hearing process. The state law provides for state
15 court proceedings before any sanctions are imposed. These differences, however, do not
16 result in a due-process violation. As described above, Arizona’s law provides for notice
17 and a hearing before a fair tribunal, which satisfy any due-process requirements.

18 Finally, Plaintiffs express concern that the Act does not require notice to
19 employees or employers. Although the statute does not require notice of investigations,¹⁸
20 all employers must receive notice of an enforcement action when it is filed. *See* Ariz. R.
21 Civ. P. 4. The Act does not address notice to employees, but issues of joinder of
22 employees could be addressed through Arizona Rule of Civil Procedure 19.¹⁹ The
23 statutes and court rules provide the necessary procedural protections to ensure due
24 process. Plaintiffs cannot meet their burden to establish a facial procedural due process
25 violation.

26 ¹⁸ Although the statute does not require notice to employers of pending investigations,
27 county attorneys and the attorney general may, of course, provide such notice.

28 ¹⁹ Plaintiffs also do not have standing to assert the rights of employees for the reasons set
 forth in Defendants’ Motion to Dismiss [dkt 38] at pages 10-13.

1 **V. The Act Does Not Violate the Substantive Due Process Guarantees of**
2 **the United States or Arizona Constitutions.**

3 In their Second Amended Complaint, the Arizona Contractor Plaintiffs contend
4 that the Act violates substantive due process under the United State and Arizona
5 Constitutions because it infringes on their “fundamental right” to associate with
6 whomever they choose and to be free from the state’s interference with interstate
7 commerce. (Second Am. Complaint [dkt 18] at ¶¶ 110-116.) In their Supplemental
8 Brief, they argue that the Act violates substantive due process because “Arizona has no
9 legitimate interest whatsoever in legislating in the area of federal immigration and no
10 legitimate interest whatsoever in legislating commerce that occurs entirely outside of its
11 borders.” (Ariz. Contractors Supp. Brief [dkt 37] at 2-3.) They do not assert that the Act
12 is subject to strict scrutiny, only that it “is not rationally related to a lawful state interest.”
13 (*Id.* at 3.) The Act, however, easily survives rational basis review.

14 If a state statute does not implicate a fundamental interest (and by relying on
15 rational basis review Plaintiffs concede that this statute does not²⁰), a court will use the
16 “rational basis” analysis and uphold the statute as long as it is “rationally related to [a]
17 legitimate government interest.[.]” *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).
18 In evaluating a statute under rational basis review, a court will presume that it is
19 constitutional and will uphold it if there is a “reasonable, even though debatable, basis for
20 its enactment.” *Standhardt v. Superior Court*, 206 Ariz. 276, 286, 77 P.3d 451, 461
21 (App. 2003) (internal quotation marks omitted). Petitioners have the burden to prove that

22
23 ²⁰ Plaintiffs’ recognition that rational basis review applies is appropriate because no
24 federal or Arizona court has indicated that a right to associate with whomever one
25 chooses or the right to be free from state laws that impact interstate commerce are
26 fundamental rights. Courts are cautious about “conferring fundamental-right status on a
27 newly asserted interest lest [they] transform the liberty protected by due process into
28 judicial policy preferences rather than principles born of public debate and legislative
action.” *Standhardt v. Superior Court*, 206 Ariz. 276, 284, 77 P.3d 451, 459 (App. 2003)
(citing, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

1 the Act is not rationally related to any conceivable legitimate state interest. *Glucksberg*,
2 521 U.S. at 728.

3 Plaintiffs cannot meet their burden of proving that the Act is not rationally related
4 to a legitimate state interest. The Act is Arizona's attempt to address the employment of
5 people who cannot legally work within this State. The Supreme Court recognized in
6 *DeCanas*, that unlawful workers may disrupt the market for lawful labor and depress
7 wages. *DeCanas*, 424 U.S. at 356. It acknowledged a State's legitimate interest in
8 employment issues within its boundaries and that prohibiting "the knowing employment .
9 . . of persons not entitled to lawful residence in the United States, let alone to work here,
10 is certainly within the mainstream of such police power regulation." *Id.* at 357. The Act
11 reflects a policy decision to impose sanctions that may include suspending or revoking
12 business licenses within this State if a business knowingly and intentionally employs
13 unauthorized aliens. The Act's provisions regarding employer sanctions are not only
14 rationally related to the legitimate state interest involved here, but are sensibly and
15 logically related to the state's goals. Plaintiffs' therefore cannot prevail on their
16 substantive due process claim.

17 **VI. The Act Does Not Violate the Commerce Clause.**

18 Although the Commerce Clause grants Congress the affirmative power to "regulate
19 Commerce . . . among the several States," states are free, in the absence of express
20 Congressional direction, to enact regulations that impact interstate commerce as long as
21 the state or local regulations are consistent with dormant Commerce Clause restrictions.
22 *See* U.S. Const. art. I, § 8, cl. 3; *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The
23 dormant Commerce Clause describes the long-held view that the Commerce Clause
24 implicitly restricts states from enacting legislation that amounts to economic
25 protectionism or that would "excite those jealousies and retaliatory measures the
26 Constitution was designed to prevent." *C & A Carbone, Inc. v. Town of Clarkstown*, 511
27 U.S. 383, 390 (1994).

28 Plaintiffs do not argue that the Act is protectionist or that it discriminates against
out-of-state companies. Rather, the Arizona Contractor Plaintiffs argue that the Act

1 violates the Commerce Clause because it somehow “impermissibly attempts to regulate
2 commerce in other states.” (Ariz. Contractors Motion [dkt 32] at 28.) Although modern
3 Commerce Clause analysis typically applies the balancing test articulated in *Pike*,²¹
4 Plaintiffs appear to be arguing only that the Act is invalid because it directly regulates
5 interstate commerce.

6 **A. The Act Does Not Directly Regulate Interstate Commerce.**

7 In assessing whether a statute “directly” regulates interstate commerce rather than
8 imposing “indirect” effects on it, courts focus on the “practical effect” of the challenged
9 statute. *See Healy v. Beer Inst. Inc.*, 491 U.S. 324, 336 (1989). A statute’s practical
10 effect is evaluated by considering both the consequences of the statute itself and how the
11 statute may interact with the legitimate regulatory regimes of other States. *Id.*; *see also*
12 *S.D. Myers Inc. v. City & County of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001).
13 Plaintiffs can prevail on their facial challenge only if the statute must “necessarily be read
14 as directly regulating interstate commerce.” *Myers*, 253 F.3d at 468. They have “the
15 burden of showing that the [statute] will have the practical effect of directly regulating
16 interstate commerce under all circumstances.” *Id.* at 469. The first step in assessing the
17 statute’s practical effect is to construe the statute’s language. A court should determine
18 whether the statutory language expressly targets out-of-state or interstate entities. *Id.* at
19 468. In doing this, the court must resolve any ambiguities in favor of the interpretation
20 that most clearly supports constitutionality. *Id.*

21 To support their Commerce Clause argument, Plaintiffs assert that the Act
22 authorizes investigations and prosecutions for “actions that occur completely outside the
23 borders of the State of Arizona.” (Ariz. Contractors Motion [dkt 32] at 28.) To reach this
24 conclusion, they rely on the definition of employer, which is expressly limited to
25 “employment services in this state,” and the definition of employee, which does not

26 ²¹ Under *Pike*, a dormant Commerce Clause inquiry first asks whether the ordinance in
27 question discriminates against interstate commerce and then, if the answer is no, proceeds
28 to balance the ordinance’s incidental burdens on interstate commerce against its putative
local benefits. *Pike*, 397 U.S. at 143.

1 specifically include the same limitation. Plaintiffs' Commerce Clause argument fails
2 because their construction of the statute is overbroad. No language in the Act expressly
3 reaches employees outside of Arizona. Plaintiffs also ignore the directive in A.R.S. § 23-
4 212(D) that enforcement actions be filed "against the employer by the county attorney *in*
5 *the county where the unauthorized alien employee is employed.*" (Emphasis added.) The
6 directive in A.R.S. § 23-212(D) regarding where actions must be filed makes it clear that
7 the Act is concerned exclusively with employees within Arizona. *See also* A.R.S. § 23-
8 212(F)(1)(b), (c), (2)(b), (d), (3) (limiting license suspensions to licenses held "at the
9 employer's business location where the unauthorized alien performed work"). The
10 statute does not attempt to permit enforcement actions concerning the employment of
11 unauthorized aliens outside of Arizona. Thus, the Act differs significantly from a state
12 statute that by its terms applies only to "national" associations or to associations with
13 members in several different states. *See e.g., Myers*, at 466 (citing *NCAA v. Miller*, 10
14 F.3d 633, 638 (9th Cir. 1993)). Indeed, the Act addresses only Arizona businesses,
15 without reference to the type or nationwide extent of the business operation.

16 The Ninth Circuit's analysis in *Myers* is instructive. In *Myers*, the Ninth Circuit
17 evaluated a San Francisco ordinance that required all contractors with the City to provide
18 nondiscriminatory benefits to employees with registered domestic partners. 253 F.3d at
19 465. One section of the ordinance made it applicable "where the work is being
20 performed by a contractor for the City within the United States." *Id.* *Myers* argued that
21 this provision required contractors to provide nondiscriminatory benefits to all employees
22 at a non-City location if any employees at that location worked on a City contract. *Id.* at
23 468. The Ninth Circuit suggested that the ordinance could be more narrowly construed
24 as meaning that contractors must "provide nondiscriminatory benefits to employees
25 working on a City contract, no matter where those employees are located." *Id.* Under
26 this construction, employers were subject to the requirements of the ordinance only as to
27 employees who had direct contact with the city. *Id.* at 469. The court found that this
28 reading provided all that was necessary for the ordinance to pass muster under the
Salerno standard for facial challenges.

1 Similarly, the Act's language supports the conclusion that the Act applies only to
2 employees within Arizona since it requires that enforcement actions be brought in the
3 county where the employee works. A.R.S. § 23-212(D). Like the ordinance in *Myers*,
4 the fact that the Act may be constitutionally applied in at least one set of circumstances--
5 that is, to employees in Arizona--means that Plaintiffs cannot satisfy their burden under
6 *Salerno* to establish that there is no set of circumstances under which the Act can be
7 constitutionally applied.

8 **B. The Risk of Inconsistent Legislation from Other States Is Purely**
9 **Theoretical.**

10 Plaintiffs also complain that the E-Verify requirement creates a risk of
11 inconsistency with the laws of other jurisdictions. (Ariz. Contractors Motion [dkt 32] at
12 28-29.) The dormant Commerce Clause analysis may include an assessment of how one
13 state's law will interact with legitimate laws in other States. *Myers*, 253 F.3d at 469.
14 For example, when the Supreme Court analyzed one state's price affirmation law in
15 *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573-84 (1986), it
16 determined that thirty-nine States had price affirmation laws, creating a confusing
17 situation for national sellers who might be subject to inconsistent obligations in different
18 States. 476 U.S. at 583; *see also Edgar v. MITE Corp.*, 457 U.S. 624, 631 n.6 (noting
19 that there were takeover statutes in effect in thirty-seven States).

20 In contrast to these concrete examples of competing laws across the county,
21 Plaintiffs in this case suggest just one source of possible conflict – an Illinois law. The
22 Illinois statute presumes to tell companies that they cannot participate in a voluntary
23 federal program.²² The Act does not, by its terms, create a conflict with the Illinois law.
24 As is true of A.R.S. § 23-212, nothing in A.R.S. § 23-214 expressly reaches out to
25 employees in other jurisdictions. Likewise, nothing in the Illinois law reaches employees
26 outside of the State of Illinois. Indeed, the express enforcement provision of the Illinois

27 ²² The federal government has filed suit asserting that federal law preempts the Illinois
28 statute. *United States v. Illinois*, Civil Action 07-3261 filed Sept. 25, 2007 (C.D.C. Ill). A
copy of the Complaint is included as Exhibit 5 hereto.

1 law highlights the fact that the law is concerned exclusively with employees working in
2 Illinois. The enforcement provision states that “an employee or applicant for
3 employment may commence an action in the circuit court to enforce the provisions of this
4 Act” and that only “[t]he circuit court for the county in which the complainant resides or
5 in which the complainant is employed shall have jurisdiction in such actions.” 820 Ill.
6 Comp. Stat. 55/15 (c). Thus, the Illinois law does not attempt to authorize enforcement
7 actions for employees outside of Illinois.

8 Here, the Act also attempts to avoid conflicts by expressly noting that no
9 construction of the statute should require an employer to take any action that it believes
10 would violate state or federal law. A.R.S. § 23-213. Thus, the Act’s language suggests
11 that employers can and should reconcile the requirements of the Arizona statute with
12 those of other state laws. At bottom, the fact that Illinois has enacted a different law
13 concerning the use of the E-Verify program within its boundaries, does not render the Act
14 facially invalid. Because the Act, including the E-Verify requirement in A.R.S. § 23-
15 214, can be constitutionally applied to employers within Arizona, Plaintiffs’ facial
16 challenge of the statute fails.

17 **VII. Plaintiffs’ Fourth Amendment Claim Fails Because Plaintiffs Do Not Allege**
18 **An Actual Injury or a Genuine and Imminent Threat of Injury.**

19 The Arizona Contractors’ Fourth Amendment claim is unique. They do not
20 contend that the State has conducted, or that it may conduct, an illegal search and seizure
21 in violation of their Fourth Amendment rights. Indeed, Plaintiffs do not contend that they
22 or any of their members have been subject to a search and seizure at all. Instead, they
23 complain that sometime in the future, the *federal* government might seek to inspect I-9
24 forms and other records relating to their participation in the federal government’s E-
25 Verify Program without a warrant or subpoena, and contend that such an inspection
26 would violate their Fourth Amendment rights because they would not have voluntarily
27 given their consent to such an inspection due to the Act’s requirement that they
28 participate in E-Verify. (Ariz. Contractors Motion [dkt 32] at 30.)

1 **A. Plaintiffs' Fourth Amendment Claim Is Not Ripe for Adjudication.**

2 Although Defendants previously briefed the problems of ripeness and standing
3 concerning the Plaintiffs' complaint as a whole, the deficiencies in this particular claim
4 warrant specific discussion. Plaintiffs present no evidence that they face any real and
5 imminent threat of injury to their Fourth Amendment rights. They instead posit only a
6 speculative possibility that at some time in the future, they may suffer a Fourth
7 Amendment violation as the result of federal conduct. "Allegations of possible future
8 injury do not satisfy the requirements of Article III. A threatened injury must be certainly
9 impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)
10 (internal quotation marks omitted); *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1044
11 (9th Cir. 1999) ("A claim is not ripe for adjudication if it rests upon contingent future
12 events that may not occur as anticipated, or indeed may not occur at all.") (internal
13 quotation marks omitted).

14 The basis for Plaintiffs' Fourth Amendment claim is that the Memorandum of
15 Understanding ("MOU") that participants in the E-Verify program must enter into
16 requires employers to allow specified federal agencies to make periodic visits to
17 employers to inspect certain records and to conduct interviews regarding the employer's
18 experience with the program. Plaintiffs have presented no evidence that they are likely to
19 be subject to an inspection pursuant to this provision, or that if they are, the inspection
20 would be conducted in a manner that violated their Fourth Amendment rights. Plaintiffs'
21 abstract and attenuated Fourth Amendment claim is not ripe for judicial resolution, and it
22 fails for the reasons set forth in Defendants' Motion to Dismiss [dkt 32].

23 **B. Plaintiffs Lack Standing to Assert a Fourth Amendment Claim.**

24 Ordinarily, a person has standing to complain of a violation of Fourth Amendment
25 rights only when an illegal search and seizure has been directed against him. *Alderman v.*
26 *United States*, 394 U.S. 165, 174 (1969); *Jones v. United States*, 362 U.S. 257, 261
27 (1960) *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83 (1980). A
28 party lacks standing to assert a violation of the Fourth Amendment if his own reasonable
expectations of privacy have not been infringed. *United States v. Taketa*, 923 F.2d 665,

1 669 (9th Cir. 1991) (citing *Rakas v. Illinois*, 439 U.S. 128, 139-40 (1978)). When parties
2 seek to enjoin future conduct, their standing hinges on the likelihood that they will suffer
3 future injury from the allegedly unconstitutional conduct. *City of Los Angeles v. Lyons*,
4 461 U.S. 95, 105 (1983) (holding that plaintiff lacked standing to seek injunctive relief
5 where he failed to establish likelihood of future injury). An association may, in an
6 appropriate case, have standing to assert the Fourth Amendment rights of its members,
7 but only if the members otherwise would have independent standing to sue. *United*
8 *States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915, 926 (9th Cir. 2006). Because
9 none of the members of the Plaintiff organizations here have yet been subjected to a
10 search and seizure pursuant to the MOU, and Plaintiffs have not established a strong
11 likelihood that they will be subject to a search, Plaintiffs lack standing to bring this claim.

12 Plaintiffs present no authority for the proposition that they have standing to
13 prospectively challenge the constitutionality of a state statute based upon a *potential*
14 Fourth Amendment violation by a federal agency. The only case that they cite, *Marshall*
15 *v. Barlow's Inc.*, 436 U.S. 307 (1978), is inapposite for two reasons. First and most
16 important, unlike the Plaintiffs in this case, the plaintiff in *Barlow's* had standing to bring
17 a Fourth Amendment challenge because he actually was subject to a warrantless search
18 by the federal government pursuant to a provision in the Occupational Health and Safety
19 Act (OSHA), 29 U.S.C. § 657(a). Second, although the OSHA provision that permitted
20 the federal government to conduct an inspection without a warrant was deemed
21 unconstitutional, the Court in *Barlow's* stated that requiring a warrant for OSHA
22 inspections did not mean that warrantless search provisions in other regulatory statutes
23 are unconstitutional, as the reasonableness of these provisions depends upon the specific
24 enforcement needs and privacy guarantees of each statute. 436 U.S. at 1825.

25 An example of a regulatory statute with a valid warrantless search provision is in
26 IRCA. IRCA requires employers to maintain and make available for inspection I-9 forms
27 for each employee hired. 8 U.S.C. § 1324a(b)(3). A warrant or subpoena is not required
28 for such inspection. Rather, an I-9 inspection may be done upon three days notice to the
employer. 8 C.F.R. § 274a.2(b)(2)(ii) (“Any person or entity required to retain Forms I-9

1 in accordance with this section shall be provided with at least three days notice prior to an
2 inspection of the Forms I-9 by officers of an authorized agency of the United States. . . .
3 No Subpoena or warrant shall be required for such inspection, but the use of such
4 enforcement tools is not precluded.”). Plaintiffs do not assert that this violates the Fourth
5 Amendment.

6 **C. Whether an Inspection Pursuant to the MOU Violates the Fourth**
7 **Amendment Must be Determined on a Case by Case Basis.**

8 The Fourth Amendment is implicated by conduct that constitutes an unreasonable
9 search and seizure. Until the federal government actually seeks to conduct an inspection
10 pursuant to the MOU, it is not possible to determine whether the inspection would violate
11 an employer’s Fourth Amendment rights. The reasonableness of an inspection will
12 depend, in part, on what procedure is followed, and what documents or information are
13 sought. It then is necessary to determine whether any exceptions to the warrant
14 requirement apply.

15 The MOU is silent as to the procedure to be used for conducting an inspection of
16 E-Verify records. Although it does not specify that a warrant or subpoena must be used,
17 it also does not prohibit the federal government from using a warrant or subpoena.
18 Plaintiffs seemingly assume that an inspection would be warrantless, but present no
19 information regarding the procedure actually used by the federal government in
20 conducting inspections pursuant to the MOU. Further, as noted above, the federal
21 government is not required to use a warrant or subpoena to inspect I-9 forms, but only to
22 give an employer three days notice. 8 C.F.R. § 274a.2(b)(2)(ii). I-9 forms are among the
23 categories of documents participants in the Program are required to maintain and make
24 available for inspection pursuant to the MOU. Thus, to the extent that an inspection
25 pursuant to the MOU sought I-9 forms, no warrant or subpoena would be required to
26 inspect those records. Consent to a search is an exception to the Fourth Amendment’s
27 warrant requirement. Whether any particular search violates the Fourth Amendment can
28 only be determined based on the facts of that particular case.

1 **VIII. The Act Does Not Violate Separation of Powers Requirements.**

2 The Arizona Contractor Plaintiffs contend that the Act violates the Arizona
3 separation of powers doctrine because it infringes upon the Executive Branch's functions
4 by mandating that every complaint be investigated, directing how an investigation must
5 be conducted, establishing what evidence may be considered, and requiring that all non-
6 frivolous cases be prosecuted. (Ariz. Contractors Supp. Br. [dkt 327] at 5.) This
7 argument fails because it relies on an erroneous interpretation of the Act and misapplies
8 the test for determining whether one branch of government is exercising powers that
9 properly belong to another branch.

10 The separation-of-powers doctrine is implicated when the exercise of the same
11 type of powers by more than one department of government significantly interferes with
12 the operations of the department to which the power properly belongs. *See J.W. Hancock*
13 *Enters., Inc. v. Ariz. State Registrar of Contractors*, 142 Ariz. 400, 405, 690 P.2d 119,
14 124 (App. 1984). "When a statute is challenged under the constitutional doctrine of
15 separation of powers, the court must search for a usurpation by one department of the
16 powers of another department on the specific facts and circumstances presented." *Id.* at
17 405, 690 P.2d at 124.

18 The separation-of-powers doctrine protects one branch of government from
19 overreaching by another branch, but it is not intended to completely separate and isolate
20 functions. *Jett v. City of Tucson*, 180 Ariz. 115, 123, 882 P.2d 426, 434 (Ariz. 1994). A
21 certain amount of blending of powers is permissible, as long as it does not result in one
22 branch exercising the *whole* power of another branch. *Hancock*, 142 Ariz. at 405, 690
23 P.2d at 124; *Andrews v. Willrich*, 200 Ariz. 533, 535, 29 P.3d 880 (App. 2001) ("An
24 unyielding separation of powers is impracticable in a complex government, and some
25 blending of powers is constitutionally acceptable."); *State v. Prentiss*, 163 Ariz. 81, 84,
26 786 P.2d 932, 935 (1989) ("The separation of powers does not require a hermetic sealing
27 off of the three branches of government.") (internal quotation marks omitted). A
28 legislative enactment violates separation of powers only if it unreasonably limits another
branch's performance of its duties. *Andrews*, 200 Ariz. at 535, 29 P.3d at 882.

1 As Plaintiffs correctly note, the separation-of-powers analysis is governed by the
2 four-part test set forth in *Hancock* and later adopted by the Arizona Supreme Court in
3 *State ex rel. Woods v. Block*, 189 Ariz. 269, 942 P.2d 428 (Ariz. 1997). The four factors
4 are: (1) the essential nature of the power being exercised; (2) the degree of control by the
5 legislative department in the exercise of the power; (3) the objective of the Legislature;
6 and (4) the practical consequences of the action, if available. *Id.* at 276, 942 P.2d at 435.

7 In applying the factors specified in *Block*, Plaintiffs identify the essential nature of
8 the power being exercised as the power to investigate and prosecute alleged violations of
9 the Act. (Ariz. Contractors Supp. Br. [dkt 37] at 6.) The Act properly assigns these
10 responsibilities to executive officials. The attorney general and county attorneys have
11 investigative authority, and the county attorneys have the authority to bring enforcement
12 actions. A.R.S. § 23-212 (B), (D). The Legislature has no role in investigations or
13 enforcement actions under the Act. The Legislature's only role under the Act is
14 participation in a legislative study committee that must report to the Speaker of the
15 Arizona House of Representatives and President of the State Senate regarding the Act's
16 implementation. Act, § 4 (employer sanctions legislative study committee).

17 The Act's provisions regarding investigations do not offend separation of powers
18 principles. The Act provides "on receipt of a complaint that an employer allegedly
19 intentionally employs an unauthorized alien or knowingly employs an unauthorized alien,
20 the attorney general or county attorney shall investigate whether the employer has
21 violated subsection A [which prohibits such employment]." A.R.S. § 23-212(B). The
22 Act does not define the term "complaint," leaving the attorney general and the county
23 attorneys responsible for determining what will constitute a complaint that must be
24 investigated. Some Arizona civil rights statutes have similar provisions requiring that all
25 complaints be investigated. *See, e.g.*, A.R.S. §§ 41-1471(A) ("After a charge is filed and
26 found to be in proper order, the division shall make an investigation of the allegations
27 contained in the charge" concerning discrimination in voting rights or public
28 accommodations); -1492.09(A) ("The attorney general shall investigate all alleged
violations of this article" concerning discrimination regarding access to public

1 accommodations and services); -1491.24(B) (“The attorney general shall investigate all
2 complaints” concerning violations of Arizona’s fair housing laws).

3 When investigating a complaint, the Act requires the attorney general or a county
4 attorney to verify work authorization through the federal government pursuant to 8
5 U.S.C. § 1373(c). A.R.S. § 23-212(B). This provision appropriately recognizes the
6 federal government authority to make these determinations, and its responsibility under
7 federal law to provide information to local officials regarding a person’s immigration
8 status when requested to do so. 8 U.S.C. § 1373(c). The direction to the attorney general
9 and the county attorneys ensures that they seek relevant information from the federal
10 authorities when conducting these investigations and that they rely on that information
11 when determining whether a person is an unauthorized alien. As a practical matter, every
12 complaint may not necessarily lead to an inquiry to the federal authorities under 8 U.S.C.
13 § 1373. Before such a request can be submitted to the federal authorities, state or county
14 investigators would need to have specific names of individuals and possibly other
15 information to submit for verification. A complaint may not provide such information,
16 and the investigation may not lead to sufficient identifying information to submit to
17 federal authorities. The attorney general and county attorneys will necessarily exercise
18 discretion as they determine how to investigate particular complaints.

19 Other than requiring that state and county investigators rely on federal information
20 to verify a person’s immigration status, the Act places no requirements or limitations on
21 an investigation. To proceed with an enforcement action, however, county attorneys will
22 need more than just the federal authorities’ response to the inquiry under 8 U.S.C. §
23 1373. To prevail in an enforcement action, the county attorney will need to establish that
24 the employer “knowingly” or “intentionally” hired the unauthorized alien. The Act does
25 not limit what additional information the attorney general or county attorneys may
26 consider during the course of the investigation.

27 With respect to prosecutorial discretion, as described above, the Act does not
28 require that the county attorney file an enforcement action for any complaint that is not
frivolous. *See* A.R.S. § 23-212(C) and (D). Subsection C specifies only that certain

1 notifications are required if a complaint is deemed not frivolous. Subsection D
2 establishes only that enforcement actions are brought “by the county attorney in the
3 county where the unauthorized alien employee is employed.” It does not mandate that an
4 enforcement action be brought for any non-frivolous complaint. The county attorneys
5 determine when an enforcement action is appropriate.

6 Merely prescribing the manner in which the Executive Branch exercises its power
7 does not violate separation-of-powers principles. *See, e.g., McDonald v. Thomas*, 202
8 Ariz. 35, 40 P.3d 819, 824 (Ariz. 2002) (the Disproportionality Review Act did not
9 violate separation of powers where it did not remove governor’s power to commute
10 sentences, but merely prescribed the manner in which the governor was required to
11 exercise that power). The Act establishes some requirements regarding investigations,
12 but executive branch officials retain the responsibility and authority to implement the
13 Act.²³

14 The legislative objective of the Act is to provide an effective mechanism to ensure
15 that Arizona’s employers hire people who are lawfully entitled to work here. This is a
16 legitimate legislative goal. *See DeCanas*, 424 U.S. at 356-57 (explaining State’s interest
17 in prohibiting the knowing employment of unauthorized aliens). The Legislature is not
18

19 ²³ The criminal cases on which Plaintiffs rely do not support their claim.(Ariz.
20 *Contractors Supp. Br. [dkt 37] at 6-7.*) In *State v. Ramsey*, the Arizona Court of Appeals
21 determined that a statute requiring the prosecutor to concur with a judge’s decision to
22 defer entry of a judgment of guilt and place a defendant on probation violates separation
23 of powers by permitting “the prosecutor to veto a court’s resolution of a criminal matter.”
24 171 Ariz. 409, 413, 831 P.2d 408, 414 (App. 1992). In *State v. Dykes*, 163, Ariz. 581,
25 585, 789 P.2d 1082, 1086 (App. 1990), the court of appeals held that a statute requiring a
26 motion from the prosecutor before a court could designate a conviction a misdemeanor
27 rather than a felony violated separation of powers by permitting an executive branch
28 official to interfere with the exercise of a judicial function. Finally, in *State v. Frey*, 141
Ariz. 321, 324, 686 P.2d 1291, 1294 (App. 1984), the court of appeals held that a judge
cannot interfere with the prosecutor’s discretion regarding a charging decision in a
criminal case. In contrast, the Legislature has not interfered with any executive branch
decisions in the Act.

1 attempting to control the implementation of this state law; the Act properly leaves the
2 responsibility for implementing the Act to executive branch officials.

3 Finally, as Plaintiffs acknowledge, the Act's practical consequences cannot be
4 assessed because the Act has not yet been implemented. Although Plaintiffs suggest that
5 the Court can just ignore this factor, the lack of any practical problems further supports
6 Defendants contention that the Court should reject Plaintiffs' claim either for lack of
7 ripeness or because they have not met their burden to establish a separation of powers
8 violation. The Arizona Supreme Court stated in *Block*, "[w]hen a statute is challenged
9 under the constitutional doctrine of separation of powers, the court must search for a
10 usurpation by one department of the powers of another department *on the specific facts*
11 *and circumstances presented.*" *Block*, 189 Ariz. at 276, 942 P.2d at 435 (emphasis
12 added) (*quoting State ex rel. Schneider v. Bennett*, 219 Kan. 285, 547 P.2d 786, 792
13 (App. 1984)). Plaintiffs present no specific facts or circumstances that establish the
14 Legislature has usurped the authority of the Executive Branch. For these reasons, the Act
15 does not violate separation of powers.
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Conclusion

For these reasons and the reasons set forth in Defendants' Motions to Dismiss, this Court should deny Plaintiffs' request to enjoin the Act.

RESPECTFULLY SUBMITTED on this 12th day of October, 2007.

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CERTIFICATE OF SERVICE

1
2 I hereby certify that on the 12th day of October, 2007, I caused the foregoing
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