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20 UNITED STATES DISTRICT COURT  
21 FOR THE DISTRICT OF ARIZONA  
22 PHOENIX DIVISION

23 VALLE DEL SOL, INC., *et al.*,  
24 Plaintiffs,  
25 vs.  
26 TERRY GODDARD, *et al.*,  
27 Defendants.  
28 \_\_\_\_\_

) Case No. CV-07-2518-PHX-SMM  
)  
) **MEMORANDUM OF POINTS**  
) **AND AUTHORITIES IN SUPPORT**  
) **OF TEMPORARY RESTRAINING**  
) **ORDER AND PRELIMINARY**  
) **INJUNCTION**

1 **INTRODUCTION**

2 On January 1, 2008, an unconstitutional immigration law will take effect in  
3 Arizona unless this Court takes action. The Legal Arizona Workers Act (the “Act”)  
4 establishes a system unique to Arizona for sanctioning employers that employ aliens who  
5 are not authorized to work even though Congress, in enacting a uniform federal scheme  
6 for the same purpose, prohibited states from crafting their own schemes. The Act’s  
7 sanctions scheme conflicts with federal law in multiple ways. The Act also unlawfully  
8 makes mandatory employer participation in a voluntary, experimental, and temporary  
9 federal employment eligibility verification program. We demonstrate below that the Act  
10 violates the Supremacy Clause because it is preempted by federal immigration law.  
11 Plaintiffs seek temporary relief to prevent the harm that will ensue from the Act.

12 **BACKGROUND**

13 **I. FEDERAL IMMIGRATION LAW**

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

21 The Immigration and Nationality Act (“INA”), 8 U.S.C. §1101, *et seq.*, as  
22 amended by IRCA sets forth a comprehensive employer sanctions scheme, including the  
23 following: It is unlawful to hire an alien “knowing the alien is an unauthorized alien.” 8  
24 U.S.C. §1324a(a)(1)(A). There is an “employment verification system” (known as the  
25 “I-9 process”) that requires an individual seeking work to present a document or  
26 documents sufficient to establish employment authorization and identity. 8 U.S.C.  
27 §1324a(b)(1). The employer is required only to verify that the documents appear genuine,  
28 not to take any affirmative steps to verify the information. 8 U.S.C. §1324a(b)(1)(A).

1 Compliance in good faith with the federal employment verification system is an  
2 affirmative defense to liability, and a good faith attempt to comply generally establishes  
3 compliance despite any technical or procedural failures. 8 U.S.C. §§1324a(a)(3), (b)(6).

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

8 Under the federal scheme, for a violation to be found there must be notice, an  
9 opportunity for a hearing before a federal administrative law judge, a finding that a  
10 violation has occurred based on a preponderance of the evidence, a chance for an  
11 administrative appeal, and an opportunity for appellate review. 8 U.S.C. §1324a(e)(2)-  
12 (3), (7)-(8). An offending employer is subject to a graduated system of civil penalties. 8  
13 U.S.C. §1324a(e)(4). Pattern or practice violators are subject to criminal penalties and  
14 injunctions. 8 U.S.C. §1324a(f). The federal scheme also carefully balances the  
15 verification requirements with extensive antidiscrimination provisions. 8 U.S.C. §1324b.

16 Congress also established a *voluntary, experimental, and temporary* program  
17 called the “Basic Pilot Program” in the Illegal Immigration Reform and Immigrant  
18 Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208 (Sept. 30, 1996). 8 U.S.C.  
19 §1324a note. The Basic Pilot Program – recently renamed the “E-Verify” program – is a  
20 program that permits employers to supplement the I-9 process by verifying an employee’s  
21 work authorization with the federal government over the Internet. Dec. of Tyler Moran  
22 (“Moran Dec.”) ¶6. E-Verify is scheduled to terminate in November 2008. Basic Pilot  
23 Program Extension and Expansion Act of 2003, Pub. L. No. 108-156 (Dec. 3, 2003); 69  
24 Fed. Reg. 75997, 75998 (Dec. 20, 2004).

25 Employers who use E-Verify must engage in various activities, including learning  
26 how to use the program; registering for the program, which includes signing a  
27 Memorandum of Understanding (“MOU”) with the Department of Homeland Security  
28 (“DHS”) and Social Security Administration (“SSA”); and submitting to the program for

1 all new hires data such as employee name, date of birth, and social security number. *E.g.*,  
2 Moran Dec. ¶¶8, 20. The MOU imposes requirements on employers, including the  
3 following: All employer representatives who use E-Verify must complete a tutorial; the  
4 employer must become familiar with and comply with the manual for the Program (which  
5 is lengthy); and the employer must agree that in verifying employment eligibility of an  
6 employee at the time of hire via the federal Form I-9 process (described above), the  
7 employer will only accept documents to establish identity that contain a photograph even  
8 though other employers are not so limited under federal law pursuant to 8 C.F.R.  
9 §274a.2(b)(1)(v)(B). Moran Dec. Exh. L at 2-4. The MOU also provides that the federal  
10 government may terminate access to E-Verify with 30 days' notice. *Id.* at 5.

11 E-Verify works by comparing data entered by employers electronically to  
12 information in federal SSA and DHS databases. *See generally id.* Exh. B at 5-8. If the  
13 databases do not match the submitted information, E-Verify issues a “tentative non-  
14 confirmation.” An employee may contest a tentative non-confirmation by contacting the  
15 federal government. If an employee does not contest the tentative non-confirmation  
16 within eight federal working days, it becomes final and the employer must terminate the  
17 employee or notify DHS that the employer is not terminating the employee. *Id.* ¶8.

18 E-Verify has a number of problems with accuracy and capacity. There are  
19 problems with tentative non-confirmation rates for foreign-born work-authorized  
20 employees and U.S.-born employees and a lack of employer compliance with E-Verify  
21 requirements, which reduces the program's effectiveness and contributes to  
22 discrimination. *Id.* Exh. I at 3. For instance, one in ten work-authorized non-citizens are  
23 initially categorized as not having work authorization by E-Verify, and almost 10 percent  
24 of naturalized U.S. citizens who are eventually found authorized to work initially received  
25 a tentative non-confirmation. *Id.* ¶11

## 26 **II. ARIZONA'S IMMIGRATION LAW**

27 Governor Janet Napolitano signed the Legal Arizona Workers Act, House Bill  
28 2779, into law on July 2, 2007. Section 2 of the Act institutes draconian sanctions against

1 employers that intentionally or knowingly employ an unauthorized alien and requires  
2 employers to use E-Verify to verify employment eligibility of their employees, and  
3 becomes effective on January 1, 2008. Ariz. Rev. Stat. §§23-212(D), §23-214. Under  
4 Section 3 of the Act, the Department of Revenue was required to provide notice of  
5 Section 2 of the Act to every employer on or before October 1, 2007.

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

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

16 The Arizona Attorney General or county attorney must investigate a complaint that  
17 an employer is violating the prohibition on employing an unauthorized alien by verifying  
18 the work authorization of the alleged unauthorized alien with the federal government,  
19 according to the procedure set forth in 8 U.S.C. §1373(c). Ariz. Rev. Stat. §23-212(B).<sup>1</sup>  
20 If upon completion of this inquiry the Arizona Attorney General or county attorney  
21 determines that the complaint regarding employing an unauthorized alien was not  
22 frivolous, then he or she must notify the federal and local law enforcement agency of the  
23 presence of the allegedly unauthorized alien. Ariz. Rev. Stat. §23-212(C)(1), (2). For all  
24 non-frivolous complaints to the Attorney General, the Act requires the Attorney General

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25  
26 <sup>1</sup> 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 to “notify the appropriate county attorney to bring an action pursuant to Subsection D.”  
2 Ariz. Rev. Stat. §23-212(C)(3). Subsection D provides that the county attorney bring an  
3 action against an employer who intentionally or knowingly employs an unauthorized alien  
4 in the county where the unauthorized alien is employed. Ariz. Rev. Stat. §23-212(D). In  
5 deciding whether an employee is unauthorized, the Superior Court may *only* consider the  
6 federal “determination” under 8 U.S.C. §1373(c), even though that “determination” is  
7 deemed to create a “rebuttable presumption of the employee’s lawful status” (Ariz. Rev.  
8 Stat. §23-212(H)), and even though §1373(c) does not concern work eligibility.

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

18 **B. Verification Of Work Status Through E-Verify**

19 The Act also requires employers, after hiring any employee, to “verify the  
20 employment eligibility of the employee through the basic pilot program.” Ariz. Rev. Stat.  
21 §23-214. That is, although Congress made E-Verify voluntary and has established an  
22 expiration date of November 2008, Arizona has made the program mandatory and  
23 permanent. The Act will add 130,000-150,000 businesses to the Program; Governor  
24 Napolitano admits that this “could strain the system.” Moran Dec. Exh. F.

25 **ARGUMENT**

26 A plaintiff seeking a temporary injunction must demonstrate either:

- 27 (1) a likelihood of success on the merits and the possibility of irreparable injury; or  
28 (2) that serious questions going to the merits were raised and the balance of

1 hardships tips sharply in its favor. These two alternatives represent “extremes of a  
2 single continuum,” rather than two separate tests.

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

#### 4 **I. PLAINTIFFS HAVE STANDING**

5 Standing requires that Plaintiffs “have suffered an ‘injury in fact’” that is “concrete  
6 and particularized” and “actual or imminent”; that the injury be “‘fairly trace[able] to the  
7 challenged action of the defendant’”; and that it is “‘likely’ . . . that the injury will be  
8 ‘redressed by a favorable decision.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-  
9 61 (1992). The cost of using E-Verify when the Act takes effect is injury. Case Nos. 07-  
10 1355, 07-1684, Order of Dec. 10, 2007, at 15; *see also Nat’l Audubon Soc’y, Inc. v.*  
11 *Davis*, 307 F.3d 835, 855 (9th Cir. 2002); *Wilbur v. Locke*, 423 F.3d 1101, 1108 (9th Cir.  
12 2005); Moran Dec. ¶20. As the Act coerces this economic injury, plaintiffs have standing  
13 to sue a proper defendant. *E.g.*, Order of Dec. 10, 2007, at 20. Such a defendant in the  
14 Court’s view – the Maricopa County Attorney – is now before the Court. *See id.* at 25.

15 To preserve the issue, plaintiffs note their view that they also have standing with  
16 regard to the State defendants. Defendants’ conduct must be “fairly traceable” only to the  
17 economic injury. *See Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984) (“[f]airly traceable”  
18 requirement “examines the causal connection between the assertedly unlawful conduct  
19 and the alleged injury”).<sup>2</sup> Section 23-214 causes plaintiffs’ injury by mandating use of E-  
20 Verify. For example, as Valle del Sol must certify compliance with state law to obtain  
21 grants, plaintiff cannot avoid the mandate. Dec. of Luz Sarmina (“Sarmina Dec.”) ¶8.  
22 Section 23-212 creates another incentive to use E-Verify that plaintiffs cannot reasonably  
23 avoid. *See, e.g.*, Sarmina Dec. ¶8. The State defendants have caused plaintiffs’ imminent  
24 injury by taking steps that the Act *requires* for implementation and that reinforce the  
25 incentive to enroll in E-Verify. *See Nat’l Audubon Soc’y*, 307 F.3d at 849.

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27 <sup>2</sup> A link between defendants and prosecution is *necessary* only when plaintiffs’  
28 injury-in-fact is the threat of prosecution. *See Nat’l Audubon Soc’y*, 307 F.3d at 849, 855.

1 The Director of the Department of Revenue sent notices commanding compliance  
2 with §23-214 and noting benefits that §23-212 attaches to E-Verify usage. Dec. of  
3 Anthony Forschino. That letter was *necessary* to implement the Act under Section 3.  
4 The notice was also coercive by showing the State takes the E-Verify requirement  
5 seriously. *See Nat'l Audubon Soc'y*, 307 F.3d at 856. The Attorney General, is also a  
6 *necessary* force behind the Act's implementation. For instance, Section 7 of the Act  
7 directs \$100,000 to the Attorney General for "enforcing" the Act.

8 Plaintiffs also satisfy redressability.<sup>3</sup> Plaintiffs' requested declaratory relief and  
9 injunction would mean that the Attorney General could no longer use his statutory  
10 appropriation for enforcement, he would have to reject the Act's mandate to investigate,  
11 and, to the extent he was called upon to do so, he would be unable to prosecute  
12 complaints. The Director of the Department of Revenue would have to rescind his  
13 enforcement message. Each of these measures would reduce plaintiffs' harm.<sup>4</sup>

## 14 **II. PLAINTIFFS ARE VERY LIKELY TO SUCCEED ON THE MERITS**

15 Under the Supremacy Clause, Article VI, Section 2, of the U.S. Constitution,  
16 federal law preempts state law if Congress so intended. *FMC Corp. v. Holliday*, 498 U.S.  
17 52, 56 (1990). "Preemption may be either express or implied, and is compelled whether  
18 Congress' command is explicitly stated in the statute's language or implicitly contained in  
19 its structure and purpose." *Id.* at 56-57 (internal quotation marks omitted).

20 Courts are especially sensitive to preemption in the immigration area for several  
21 reasons. First, the U.S. Constitution itself establishes the "preeminent role of the Federal  
22 Government with respect to the regulation of aliens within our borders." *Toll v. Moreno*,

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24 <sup>3</sup> Like causation, the redressability inquiry does not turn on defendants'  
25 prosecutorial authority because plaintiffs need only show that "the relief [they] request  
26 might have a substantial effect on" their "alleged injury." *Allen*, 468 U.S. at 753 n.19.

27 <sup>4</sup> The Court previously concluded that "[a]n injunction to send a curative notice  
28 would be empty, for Plaintiffs have advice from their counsel in this litigation and need  
no further notice about the Act from the Director." Order of Dec. 10, 2007, at 21. But it  
is the Director's notice – not counsel's view of the law – that caused the harm, and  
continues to so by standing as the statement of the *State's* official position.

1 458 U.S. 1, 10 (1982). In addition, laws relating to foreign nationals are inextricably  
2 intertwined with international relations and are therefore a particular concern of the  
3 federal government. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941). Finally, there is a  
4 special need for nationwide consistency in matters affecting foreign nationals, given the  
5 “explicit constitutional requirement of uniformity” in immigration matters and the myriad  
6 problems that would result if each of the 50 states – or each of the thousands of local  
7 governments – adopted its own rules for the treatment of aliens. *Graham v. Richardson*,  
8 403 U.S. 365, 382 (1971); *see also Zadvydas v. Davis*, 533 U.S. 678, 700 (2001)  
9 (recognizing “the Nation’s need ‘to speak with one voice’ in immigration matters”).

10 **A. The Prohibition On Intentionally Or Knowingly Employing An**  
11 **Unauthorized Alient Is Preempted By Federal Immigration Law**

12 **1. Express Preemption**

13 IRCA contains an express preemption provision: “The provisions of this section  
14 preempt any State or local law imposing civil or criminal sanctions (other than through  
15 licensing and similar laws) upon those who employ, or recruit or refer for a fee for  
16 employment, unauthorized aliens.” 8 U.S.C. §1324a(h)(2).

17 On its face, the Legal Arizona Workers Act does not even purport to be a licensing  
18 law (or similar to a licensing law) such that it would fall within the savings clause  
19 exception for “licensing and similar laws.” The Act’s title makes no reference to  
20 licensing. The Act is codified separately from any licensing provisions. The Act  
21 encompasses legal instruments that neither the State nor common sense would consider  
22 “licenses” in the usual context such as articles of incorporation, certificates of  
23 partnership, partnership registrations, and articles of organization. Ariz. Rev. Stat. §23-  
24 211(7). The Act imposes sanctions beyond even the “licenses” as defined in the Act, such  
25 as requiring employers to file reports of each employee hired and to sign affidavits stating  
26 that they have terminated the employment of all unauthorized aliens. Ariz. Rev. Stat.  
27 §23-212(F)(1)(b), (c), (2)(b), (d). The goal of the Act is to set forth a general prohibition  
28 on the employment of unauthorized workers, not to impose particular conditions as part

1 of specific licensing procedures. Section 1324a(h)(2)'s narrow licensing law exception  
2 does not save a law of such breadth from preemption. Were there any doubt, Congress  
3 should not be deemed to have intended to allow states to impose a "business death  
4 penalty" on employers through a parenthetical exception to a sweeping express  
5 preemption provision. Courts "decline to give broad effect to saving clauses where doing  
6 so would upset the careful regulatory scheme established by federal law." *United States*  
7 *v. Locke*, 529 U.S. 89, 106-07 (2000).

8 This reading is buttressed by IRCA's legislative history. The House Report states  
9 that IRCA does not preempt "licensing" laws "which specifically require such licensee or  
10 contractor to refrain from hiring, recruiting or referring undocumented aliens" and was  
11 "not intended to preempt or prevent lawful state or local processes concerning the  
12 suspension, revocation or refusal to reissue a license *to any person who has been found to*  
13 *have violated the sanctions provision in this legislation.*" H.R. Rep. No. 99-682(I), at 58  
14 (1986), 1986 USCCAN 5649, 5662 (emphasis added). The Legal Arizona Workers Act,  
15 however, is not a licensing law that merely requires employers to refrain from certain  
16 hiring and does not turn on IRCA's violation but violation of the State Act.

## 17 2. Implied Preemption

18 The doctrine of implied preemption also requires invalidating the Act's prohibition  
19 on intentionally or knowingly employing an unauthorized alien. State laws regarding  
20 immigration and foreign nationals are impliedly preempted "where the scope of the  
21 federal law at issue indicates that Congress intended federal law to occupy the field  
22 exclusively or where state or local laws conflict with federal laws." *Lozano v. City of*  
23 *Hazleton*, 496 F.Supp.2d 477, 521 (M.D. Pa. 2007) (internal quotation marks omitted).<sup>5</sup>

### 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

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27  
28 <sup>5</sup> 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). The  
2 Supreme Court has held that IRCA is a “comprehensive scheme” prohibiting employment  
3 of unauthorized workers. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137,  
4 147 (2002). It is inconceivable given the care that Congress took in crafting its  
5 employment verification scheme that every state and locality could devise its own.

6 b. Conflict Preemption

7 If a state law “burdens or conflicts in any manner with any federal laws or  
8 treaties,” then it is preempted. *De Canas v. Bica*, 424 U.S. 351, 358 n.5 (1976). Under  
9 conflict preemption, a state law is preempted if it ““stands as an obstacle to the  
10 accomplishment and execution of the full purposes and objectives of Congress.”” *English*  
11 *v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Hines*, 312 U.S. at 67). When a  
12 state attempted to enforce an alien registration scheme, the Supreme Court explained that  
13 “where the federal government, in the exercise of its superior authority in this field, has  
14 enacted a complete scheme of regulation and has therein provided a standard for the  
15 registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict  
16 or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary  
17 regulations.” *Hines*, 312 U.S. at 66-67. The same is true for state schemes designed to  
18 prohibit employing unauthorized aliens. *See, e.g., Rogers v. Larson*, 563 F.2d 617, 626  
19 (3d Cir. 1977) (invalidating Virgin Islands employer sanctions scheme and ruling that  
20 “[b]ecause of the different emphasis the [Virgin Islands and federal employment]  
21 schemes place on the purposes of job protection and an adequate labor force, we conclude  
22 that [the Virgin Islands statute] stands as an obstacle to the accomplishment and  
23 execution of the full purposes and objectives of the INA”).

24 The Legal Arizona Workers Act poses significant obstacles to the accomplishment  
25 and execution of the full purposes and objectives of Congress. First, the Act conflicts  
26 with federal law by requiring the verification of individuals who are excepted from the  
27 federal scheme. The Act’s broad definition of “employee” (Ariz. Rev. Stat. §23-211(3))  
28 includes workers such as independent contractors and casual domestic employees, even

1 though federal law imposes no requirement to verify the status of such workers. 8 C.F.R.  
2 §274a.1(f), (h), (j); *see also* H.R. Rep. 99-682(I), at 57, 1986 USCCAN at 5661 (“It is not  
3 the intent of this Committee that sanctions would apply in the case of casual hires.”).

4 Second, under Arizona’s Act, the process afforded to employers and employees  
5 falls far short of the process that Congress granted. Under IRCA, a violation is found  
6 only after an administrative law judge with expertise in immigration matters determines,  
7 “upon the preponderance of the evidence received,” including any witnesses and  
8 production of evidence, that the violation had occurred. 8 U.S.C. §1324a(e)(2), (3)(C).  
9 An employer can seek judicial review. 8 U.S.C. §1324a(e)(7)-(8). Yet, the Act allows a  
10 violation to be found after inquiry to the federal government pursuant to 8 U.S.C.  
11 §1373(c) – even though §1373(c) does not refer to a federal determination of work status  
12 – and prosecution in state court. Ariz. Rev. Stat. §23-212(B), (D), (F), (H). Employers  
13 and employees are not given any notice or opportunity to challenge the federal  
14 government’s response to an inquiry regarding work status. Although the Act states that  
15 the federal government’s determination creates only a “rebuttable presumption” (Ariz.  
16 Rev. Stat. §23-212(H)), the interpretation and application of federal immigration law is an  
17 exclusively federal matter, and the Act itself recognizes this by providing that “[o]n  
18 determining whether an employee is an unauthorized alien, the court shall consider *only*  
19 the federal government’s determination.” Ariz. Rev. Stat. §23-212(H) (emphasis added).  
20 But the Act does not provide for (nor could Arizona require) any federal determination,  
21 after full process as required in 8 U.S.C. §1324a(e), of a violation. This insufficient  
22 process means employers who may not be found in violation of IRCA could be found  
23 liable under the Act.

24 Third, the Act sets forth a wildly differing, and much more severe, system of  
25 penalties than federal law, and fails to include any countervailing anti-discrimination  
26 provisions. Congress carefully calibrated the penalties in federal law and accompanied its  
27 sanctions provisions with strong antidiscrimination measures, because it was understood  
28 that a consequence of penalties for employers who employ unauthorized workers is to

1 increase the incentive for employers to fire or refuse to hire members of minority groups  
2 in the belief that this will help avoid liability. *See, e.g.*, H.R. Rep. 99-682(II), at 12  
3 (1986), 1986 USCCAN 5757, 5761. Accordingly, Congress created a gradual scale of  
4 civil penalties. 8 U.S.C. §1324a(e)(4). Possible criminal penalties are reserved for  
5 “pattern or practice” violators. 8 U.S.C. §1324a(f). Congress also instituted extensive  
6 anti-discrimination provisions. 8 U.S.C. §1324b. Indeed, Congress explicitly linked the  
7 employer verification provisions to the antidiscrimination provisions by forcing the latter  
8 to expire if the employer sanction provisions were repealed. 8 U.S.C. §1324b(k).

9 In contrast, the cost of even a temporary suspension under the Act – much less a  
10 complete shutdown – would frequently exceed the federal limits. And Arizona’s Act  
11 lacks an anti-discrimination clause. Governor Napolitano admits that the Act attempts to  
12 impose “the most aggressive action in the country.” Moran Dec. Exh. E. But the State  
13 may not “use an iron fist where the [federal government] has consistently chosen kid  
14 gloves.” *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427 (2003).

15 Fourth, although Congress was concerned about imposing undue burdens on  
16 employers (H.R. Rep. 99-682(I), at 56, 90, 1986 USCCAN at 5660, 5694), the Arizona  
17 complaint process burdens employers by lowering the bar for initiating investigations.  
18 Under the Act, employers may have to defend themselves even when the federal  
19 government would not act. *Any* complaint under the Act will result in an investigation,  
20 and all non-frivolous complaints to the Attorney General will result in referral for court  
21 action. Ariz. Rev. Stat. §23-212(B), (C)(3). In contrast, under IRCA, only complaints  
22 “which, on their face, have a substantial probability of validity” or other violations “as the  
23 Attorney General determines to be appropriate” are investigated. 8 U.S.C. §1324a(e)(1).

24 Fifth, IRCA contains an affirmative defense for employers who comply in good  
25 faith with the I-9 process. 8 U.S.C. §1324a(a)(3). This defense represents Congress’  
26 considered judgment that employers who use the I-9 process should be safeguarded from  
27 sanctions. Recognizing the necessity of incorporating this defense so as not to conflict  
28 with federal law, the Arizona Act purports to provide a similar affirmative defense. Ariz.

1 Rev. Stat. §23-212(J). But IRCA precludes use of the Form I-9 documents for this  
2 purpose: The documents used in the federal verification process “may not be used for  
3 purposes other than for enforcement of this chapter [IRCA] and sections [of Title 18 of  
4 the U.S. Code].” 8 U.S.C. §1324a(b)(5). Accordingly, there is an irreconcilable conflict  
5 between the Act and federal law because employers charged with a violation of the Act  
6 cannot lawfully avail themselves of the I-9 affirmative defense.

7 Finally, the Act burdens federal resources. *See Garrett v. City of Escondido*, 465  
8 F.Supp.2d 1043, 1057 (S.D. Cal. 2006) (discussing conflict preemption based on burden).  
9 Every complaint under the Act triggers an inquiry to the federal government (Ariz. Rev.  
10 Stat. §23-212(B)), and will consume federal resources. Likewise, the Act will cause  
11 significant increased use of E-Verify. Moran Dec. Exh. F.

12 **B. The Requirement To Use The Voluntary E-Verify Program Is**  
13 **Preempted By Federal Immigration Law**

14 The Arizona Act states that employers, after hiring an employee, “shall verify the  
15 employment eligibility of the employee through the Basic Pilot Program.” Ariz. Rev.  
16 Stat. §23-214. This requirement is invalid under both conflict and field preemption. By  
17 requiring employers to use a program that Congress designated voluntary, Arizona  
18 adopted a law that “burdens or conflicts . . . with . . . federal laws” (*De Canas*, 424 U.S. at  
19 358), and for the same reason, regulated in an area where Congress sought to oust state  
20 power, and is field preempted. *See English*, 496 U.S. at 79 n.5 (“[F]ield pre-emption may  
21 be understood as a species of conflict pre-emption: A state law that falls within a pre-  
22 empted field conflicts with Congress’ intent . . . to exclude state regulation.”).

23 Congress designated E-Verify as a voluntary, experimental program to be  
24 implemented by the Secretary of Homeland Security. IIRIRA, §402 (entitled “Voluntary  
25 election to participate in a pilot program”); IIRIRA, §402(a) (entitled “Voluntary  
26 election” and providing that “any person or other entity that conducts any hiring (or  
27 recruitment or referral) . . . *may elect* to participate in that pilot program,” but Secretary  
28 “*may not require* any person or other entity to participate in a pilot program”) (emphases

1 added). 8 U.S.C. §1324a note. In contrast, the Arizona Act makes participation  
2 mandatory for Arizona employers. The conflict is direct and plain.

3 The Act mandates use of E-Verify even though the program has problems with  
4 accuracy. *E.g.*, Moran Dec. ¶¶10-11. A recent federal study found an error rate across  
5 the board of four percent. *Id.* Exh. H at ii. Error rates for naturalized citizens and non-  
6 citizens are much higher. *Id.* ¶11. Employers that participate in E-Verify routinely  
7 misuse the system in ways that compound the effects of these errors. *Id.* ¶15. These and  
8 other problems show Congress' wisdom in making E-Verify voluntary and temporary.  
9 The attempt to force employers to use E-Verify is incompatible with federal law.  
10 Congress plainly did not intend to allow some states to mandate E-Verify use while it  
11 continues to be in its experimental and evaluative stage.

12 Making E-Verify mandatory imposes significant burdens on employers, who will  
13 need to learn how to use the program; go through the registration process for E-Verify,  
14 including signing a MOU with DHS and SSA; become familiar with and comply with the  
15 lengthy E-Verify manual; provide a tutorial for all employer representatives who use E-  
16 Verify; and use E-Verify for all new hires. Moran Dec. ¶¶8, 20 & Exh. L. The MOU  
17 also requires that in verifying employment eligibility of an employee, employers will only  
18 accept documents to establish identity that contain a photograph – although other  
19 employers are not so limited under 8 C.F.R. §274a.2(b)(1)(v)(B). Moran Dec. Exh. L at  
20 2. By making these requirements and limitations mandatory, the Act subjects Arizona  
21 employers to a different set of legal requirements from the ones that Congress has decided  
22 will apply to all employers in the United States, except those that *elect* to participate in  
23 E-Verify. The MOU also provides that the federal government may terminate access to  
24 the Program with 30 days' notice (*id.* at 5), and the authorizing statute provides that the  
25 Program will terminate in 2008. Pub. L. No. 108-156; 69 Fed. Reg. at 75998. There is a  
26 basic incompatibility in Arizona making E-Verify mandatory and permanent when the  
27 federal government may terminate an employer's access and when E-Verify will soon  
28 cease to exist absent further federal legislation.

1 The Arizona Act could also strain the federal system by using E-Verify in an  
2 unanticipated manner. *See Garrett*, 465 F.Supp.2d at 1057. The Act will increase use of  
3 E-Verify almost ten-fold by adding 130,000 to 150,000 new businesses. Moran Dec.  
4 Exh. F. In light of this drastic increase, even Governor Napolitano has cast doubt on the  
5 ability of the system to handle the volume of usage resulting from the Arizona law. *Id.*;  
6 *see also* Moran Dec. ¶¶17-19 & Exh. B at 8-9. Indeed, many other states and localities  
7 might follow Arizona’s lead if the Act were upheld, and the cumulative effect could  
8 destroy the effectiveness of the system.

### 9 **III. THE BALANCE OF HARMS TIPS SHARPLY IN PLAINTIFFS’ FAVOR**

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

#### 15 **A. Irreparable Harm**

16 Implementation of the Act will cause irreparable harm. *Cf. Lozano v. City of*  
17 *Hazleton*, 459 F.Supp.2d 332 (M.D. Pa. 2006) (issuing TRO against law that required  
18 tenants to obtain proof of legal citizenship or residence and prohibited employers from  
19 employing undocumented aliens); *Garrett v. Escondido*, 465 F.Supp.2d 1043 (issuing  
20 TRO against law that prohibited renting to undocumented aliens).

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

25 Second, there will be numerous concrete harms if the Act goes into effect.  
26 Employers will have to go through the burden of learning how to use and registering for  
27 E-Verify and will be subjected to additional requirements set forth in the E-Verify MOU.  
28 *E.g.*, Sarmina Dec. ¶9; Dec. of Edmundo Hidalgo (“Hidalgo Dec.”) ¶13. Employers will

1 be faced with State sanctions when the federal inquiry procedure makes a mistake. Some  
2 workers who are eligible for employment, particularly foreign-born workers, will be  
3 terminated out of fear of sanction. Moran Dec. ¶16. Employers will also terminate  
4 employees based on errors in the database even though those employees are authorized to  
5 work. *See id.* ¶11. Moreover, employees who are authorized to work will have  
6 difficulties resolving problems in the databases. *Id.* ¶12. Organizations will have to  
7 divert resources to assist employees. Sarmina Dec. ¶12; Hidalgo Dec. ¶16.

8 Finally, Arizona’s intrusion into the uniquely federal field of immigration will  
9 cause great harm to national immigration law and policy and burden on the federal  
10 government. It is common-sense that federal immigration law will be further weakened if  
11 other states and local governments are emboldened by Arizona to establish piecemeal  
12 immigration standards and procedures across the country.

13 **B. There Is No Harm In Preserving The Status Quo**

14 An order preserving the status quo would not cause any real harm to defendants.  
15 There is no pressing need for the Act to be implemented immediately. Moreover, the  
16 State can claim no interest in enforcing a law that is very likely to be held  
17 unconstitutional. *See Florida Businessmen for Free Enterprise v. City of Hollywood*, 648  
18 F.2d 956, 959 (5th Cir. 1981) (“harm to the city from delaying enforcement is slight” in  
19 light of likelihood of success on merits). Indeed, Governor Napolitano in her signing  
20 statement conceded that the State itself stands to be harmed by the Act as it currently  
21 stands because there is no exception for license revocation of such critical businesses as  
22 hospitals and power plants. Moran Dec. Exh. D at 2. Accordingly, a status quo  
23 injunction would not harm – and would even benefit – the State.

24 Moreover, the public interest weighs strongly in favor of a temporary injunction  
25 where, as here, the law sought to be enjoined is unconstitutional because it is contrary to a  
26 statute adopted by Congress. “The preservation of the rights in the Constitution and the  
27 legality of the process by which government agencies function certainly weighs heavily in  
28 the public interest.” *National Treasury Employees Union v. U.S. Dep’t of Treasury*, 838

1 F.Supp. 631, 640 (D.D.C. 1993); *see also Florida Businessmen for Free Enterprise*, 648  
2 F.2d at 959 (“public interest does not support the city’s expenditure of time, money, and  
3 effort in attempting to enforce an ordinance that may well be held unconstitutional”).<sup>6</sup>

4 **CONCLUSION**

5 For these reasons, the Court should temporarily enjoin defendants from  
6 implementing or enforcing Section 2 of the Legal Arizona Workers Act.

7 Dated: December 12, 2007

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24  
25 \_\_\_\_\_  
26 <sup>6</sup> No bond is necessary in this case for each of the following separate and  
27 independent reasons. First, Plaintiffs have a strong likelihood of success on the merits.  
28 *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972). Second, there is no realistic  
likelihood of harm (monetary or otherwise) to defendants from enjoining their conduct.  
*Jorgensen v. Cassidy*, 320 F.3d 906, 919-20 (9th Cir. 2003); *Garrett*, 465 F.Supp.2d at  
1060. And third, the “equities of potential hardships to the parties” weigh in favor of  
plaintiffs. *Temple Univ. v. White*, 941 F.2d 201, 220 (3d Cir. 1991).

1 CERTIFICATE OF SERVICE

2 I hereby certify that on December 12, 2007, I electronically transmitted the  
3 foregoing document to the Clerk's Office using the CM/ECF System for filing and e-  
4 mailed the document to the following:

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