Stephen P. Berzon
Jonathan Weissglass
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
Email: jweissglass@altshulerberzon.com

Kristina M. Campbell
(AZ Bar No. 023139)
Cynthia A. Valenzuela
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 S. Spring Street, 11th Floor
Los Angeles, CA 90014
Telephone: (213) 629-2512, x136
Facsimile: (213) 629-0266
Email: kcampbell@maldef.org

(Additional Counsel on Next Page)

Linton Joaquin
Monica T. Guizar
Karen C. Tumlin
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
Telephone: (213) 639-3900
Facsimile: (213) 639-3911
Email: tumlin@nilc.org

Daniel Pochoda (AZ Bar No. 021979)
ACLU FOUNDATION OF ARIZONA
P.O. Box 17148
Phoenix, AZ 85011-0148
Telephone: (602) 650-1854
Facsimile: (602) 650-1376
Email: dpochoda@acluaz.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ARIZONA CONTRACTORS ASSOCIATION, INC., *et al.*, Plaintiffs, vs. JANET NAPOLITANO, *et al.*, Defendants.	Case No. CIV-07-1355-PHX-NVW **CPLC PLAINTIFFS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PRELIMINARY INJUNCTION AND FINAL DECISION ON THE MERITS**
CHICANOS POR LA CAUSA, INC.; and SOMOS AMERICA, Plaintiffs, vs. JANET NAPOLITANO, *et al.*, Defendants.	Case No. CIV-07-1684-PHX-MHB

Lucas Guttentag
Jennifer C. Chang
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0770
Facsimile: (415) 395-0950
E-mail: jchang@aclu.org

Omar C. Jadwat
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2620
Facsimile: (212)-549-2654
Email: ojadwat@aclu.org

Attorneys for Plaintiffs

ARGUMENT

1. *Preemption.* As a threshold matter, defendants are incorrect that any presumption against preemption applies in these circumstances. *See* Def. Opp. Mem. at 3:20-4:6. There are exceptionally strong federal interests in the area of immigration, and federal immigration law has directly addressed the same topics as the Legal Arizona Workers Act for more than two decades. Pl. Opening Mem. at 7:13-24, 8:4-10, 9:25-10:12. "[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000); *see also Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 518 n.41 (M.D. Pa. 2007) (declining to apply presumption against preemption in analysis of similar provision). Even if applied, any such presumption would readily be overcome in this case given the strong reasons the Act is preempted.

a. *Employer Sanctions Provision.* Defendants' attempt to save the Act's prohibition on intentionally or knowingly employing an unauthorized alien from express preemption turns on an extremely expansive, and ultimately untenable, reading of the parenthetical saving clause in 8 U.S.C. §1324a(h)(2). As plaintiffs have explained, the thrust of §1324a(h)(2) is to prohibit *any* state or local civil or criminal sanctions, no matter how slight, for employing unauthorized workers, as part of a detailed, comprehensive regulatory scheme established by the federal Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. §§1324a-1324b, that includes a graduated system of penalties. Pl. Opening Mem. at 8:3-9:9. In defendants' view, however, §1324a(h)(2)'s parenthetical reference to "licensing and similar laws" exempts the Act and grants states and municipalities the permission to establish independent employer sanctions systems that impose the "death penalty" on businesses that they find in violation of the law. Def. Opp. Mem. at 5-10.

Defendants' view is mistaken. The Legal Arizona Workers Act does not even purport to be a licensing law (or similar to a licensing law) on its face. The Act's title makes no reference to licensing; the Act is codified separately from any licensing

provisions; the Act encompasses legal instruments that neither the State nor common sense would consider "licenses" in the usual context; the Act imposes sanctions beyond even the "licenses" as defined in the Act; and the goal of the Act is to set forth a general prohibition on the employment of unauthorized workers, not to impose particular conditions as part of specific licensing procedures. Section 1324a(h)(2)'s narrow licensing law exception does not save a law of such breadth from preemption.

To be sure, the precise scope of the licensing law exception is not set forth in the statute. For this reason, the legislative history is instructive. The relevant legislative history clarifies that the exception relates to licensing laws that revoke or suspend the licenses of entities "found to have violated *the sanctions provisions in this legislation*." H.R. Rep. No. 99-682(I), at 58 (1986), 1996 USCCAN 5649, 5662 (emphasis added). Defendants' attempt to make this unambiguous statement ambiguous makes no sense. *See* Def. Opp. Mem. at 7:5-11. The sole possible meaning of the House Report is that state licensing laws are excepted under §1324a(h)(2) only to the extent that they rely on a finding that IRCA's sanctions provisions apply – a finding that only the federal government can make. *See Lozano*, 496 F.Supp.2d at 519-20.

As plaintiffs have previously explained, and as the *Lozano* court found, the opposite result would be absurd. Pl. Opening Mem. at 8:22-9:9. Were defendants' argument accepted, any state or locality could pass a law authorizing its officials to determine whether a business had employed an unauthorized worker and then impose a "business death penalty" on such entity, thereby overriding Congress' considered judgment as to the nature and magnitude of sanctions that should attach to violations of IRCA and the federal process used to assess such sanctions. Further, under defendants' expansive interpretation of "licensing and similar laws," a state or town could apply penalties under the guise of virtually any law regulating a business. Defendants' view is untenable. Courts "decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106-07. In contrast, reading

§1324a(h)(2) consistently with the legislative history preserves the provision's meaning while maintaining the integrity of the federal scheme.

In addition to being expressly preempted, plaintiffs previously demonstrated that the Act encroaches on a field of regulation entirely occupied by the federal government and, moreover, conflicts with federal law in multiple ways. Pl. Opening Mem. at 9:17-13:24. Defendants acknowledge the critical point that the federal immigration law governing employment of unauthorized aliens constitutes "a comprehensive federal scheme." Def. Opp. Mem. at 10:25. "The State is powerless to enact its own scheme to regulate immigration or to devise immigration regulations which run parallel to or purport to supplement the federal immigration laws." *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755, 786 (C.D. Cal. 1995). Perhaps recognizing the strength of field preemption, defendants contend only that "the federal scheme does not oust state policies that are within the preemption exception in 8 U.S.C. § 1324a(h)(2)." Def. Opp. Mem. at 10:25-26. But as plaintiffs have shown above, the broad Arizona Act cannot be saved by reference to that exception. Congress certainly did not intend to allow states to enact their own employer sanctions laws that would put employers out of business for violations of state law; Congress imposed much less harsh penalties even for repeat serious offenders. 8 U.S.C. §1324a(e)(4).

Moreover, state law that "burdens or conflicts in any manner with any federal laws or treaties" is preempted. *De Canas v. Bica*, 424 U.S. 351, 358 n.5 (1976).[1] The Act burdens federal resources and conflicts with federal law by requiring the verification of individuals who are excepted from the federal scheme, setting forth a different system of penalties than federal law, failing to include any countervailing anti-discrimination provisions, providing different and lesser process than the federal scheme, lowering the bar

[1] The Supreme Court decided *De Canas* a decade before Congress enacted IRCA, and never decided whether the statute in that case was conflict preempted, but instead expressly reserved that question and remanded the case for a determination of that issue. 424 U.S. at 363-65. On remand, the plaintiffs, who were seeking enforcement of the statute, "dropped" the case, so the validity of the statute was never finally resolved. *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391, 1394 (9th Cir. 1986).

for initiating investigations and finding violations, and requiring use of the voluntary federal Basic Pilot Program. Pl. Opening Mem. at 11:9-13:22.

Defendants argue that the increased burden on federal resources "is actually consistent with federal law, which encourages local agencies to communicate with federal authorities regarding immigration status," and that "[f]ederal law requires that federal officials respond to State and local inquiries concerning immigration status." Def. Opp. Mem. at 14:5-12, 21-23. But defendants have failed to point to *any* federal law that obligates the federal government to respond to state queries on *employment authorization* status or encourages such queries, let alone mandates them. The concerns expressed by the court in *Garrett v. City of Escondido* apply with at least the same force here. 465 F.Supp.2d 1043, 1057 (S.D. Cal. 2006) (noting concerns with increased use of federal immigration database due to requirement in local ordinance and for purposes for which database was not intended).

Defendants seriously dispute only one of the actual conflicts plaintiffs have cited. Defendants argue that the Act does not require employers to verify certain workers who are excepted from IRCA's verification requirements because other provisions would have the practical effect of excluding independent contractors and domestic workers from the law. Def. Opp. Mem. at 15:15-16:12. That explanation fails, however, because the cited definitions (other than "unauthorized worker," about which there is no dispute) do not match the federal exceptions and because they do not at all address the situation of workers who are grandfathered from IRCA's requirements. *See* Pl. Opening Mem. at 11:10-19.

With respect to the other conflicts, defendants do not really deny that they exist, but instead disagree about their legal significance. For example, they do not dispute that an employer could be found in violation of the state law but not the federal law, rather claiming that "is simply a result that sometimes occurs in a federalist system" and "particularly where Congress specifically preserved State authority to impose sanctions through State licensing laws . . . the possibility of different outcomes does not mean the

state action is preempted." Def. Opp. Mem. at 13:21-14:2.[2] Similarly, they do not dispute that the penalties provided under the Act are grossly different from those prescribed by IRCA, but argue that "Congress . . . left states the authority and discretion to adopt such sanctions through their licensing laws as they deem appropriate." Def. Opp. Mem. at 12:9-12.

Defendants are mistaken both as to the effect of the express preemption provision and as to what constitutes a conflict under preemption doctrine. Defendants' frequent resort during the *implied preemption* analysis to their reading of the *express* preemption provision's saving clause ignores that a "saving clause (like [an] express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000). Thus, even if defendants were correct that the Act is not expressly preempted, the Act is nonetheless preempted because its provisions conflict with federal law.

As for the working of preemption principles, defendants correctly note that conflict will be found where a "state law stands as an obstacle to the accomplishment and execution of the full purposes of Congress." Def. Opp. Mem. at 11:6-7 (internal quotation marks omitted). Defendants, however, fail to explain how the Arizona Act's application to different conduct, imposition of differing penalties, use of different procedures, and failure to provide protections can be considered not to stand as an obstacle to Congress' full purposes as expressed in its employer sanctions scheme. In that scheme, as we have explained, Congress carefully selected what prohibitions, penalties, procedures, and protections would properly balance its desire to discourage the employment of unauthorized workers against the risk of increased discrimination and disruption to businesses. Pl. Opening Mem. at 2:7-3:18, 9:25-13:15.

Merely arguing that the Arizona law shares one objective with IRCA – "to prohibit the employment of unauthorized aliens" (Def. Opp. Mem. at 12:1-2) – does not make

[2] As demonstrated above, it is precisely because Congress wished to avoid "the possibility of different outcomes" that it conditioned any state licensing sanction on an employer first having been found in violation of IRCA's federal sanctions scheme.

Congress' other purposes, goals, and choices irrelevant. As the Supreme Court has explained, "[t]he fact of a common end hardly neutralizes conflicting means . . . and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379-380 (2000). Rather, "the inconsistency of sanctions here undermines the congressional calibration of force." *Id.* at 380; *accord Geier*, 529 U.S. at 874-886 (invalidating state tort action where duty imposed would, although seeking car safety like the federal standard, conflict with particular means that federal government chose to reach that goal); *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977) (invalidating employer sanctions statute that "strike[s] the balance between . . . two goals differently" than federal immigration law).[3]

b. *Mandatory Basic Pilot Program Participation.* We previously explained that the Basic Pilot Program (now renamed E-Verify) is a voluntary, experimental, and temporary federal program. Pl. Opening Mem. at 3:11-4:28, 13:25-15:19. Defendants concede that the program is voluntary. Def. Opp. Mem. at 29:21-22 (Illinois statute "presumes to tell companies that they cannot participate in a *voluntary* federal program") (emphasis added); *id.* at 18:16 ("federal law did not impose E-Verify as a requirement"); *id.* at 19:10-11 ("it has been established as a discretionary program"). They have also submitted exhibits further confirming the voluntary nature of the program. *See*

[3] Neither *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc), nor *Incalza v. Fendi North America, Inc.*, 479 F.3d 1005 (9th Cir. 2007), is to the contrary. *Gonzales* addressed whether states could directly enforce federal law, not whether they could pass their own laws aimed at the same subjects, and in any event offers no assistance to defendants because in that case the Ninth Circuit was willing to "assume that the civil provisions of [federal immigration law] . . . constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration." 722 F.2d at 474-75. *Incalza* also did not involve a state law that sought to supplement federal immigration law. Rather, that case involved the interaction between IRCA and a state law that was entirely unrelated to immigration. In *Incalza*, the defendant employer claimed that it was required to terminate the plaintiff under IRCA and that, to the extent state law required a different result, it was preempted. 479 F.3d at 1008-9. The Ninth Circuit rejected the employer's argument, concluding that because IRCA did not require the plaintiff's termination, the employer could properly be liable for damages under state law. *Id.* at 1009-13.

id., Exh. 2, at 1, 2 (Secretary of Homeland Security describing Basic Pilot as "voluntary," noting that failed Senate bill "would have actually made enrollment in E-Verify mandatory," and stating that "we cannot mandate all employers to use this system"); *id*., Exh. 5, ¶13 (complaint filed by United States stating that "Congress provided that employers may *elect* to participate in the Basic Pilot Program, except for specified entities of the U.S. Government and certain [other] entities . . . whose participation was made mandatory") (emphasis added). Moreover, defendants have pointed to no indication that Congress left any room for state participation in what they admit is "a comprehensive regulatory scheme." Def. Opp. Mem. at 18:6-7.[4]

Against this backdrop, the conflict is stark and plain. Congress chose to make Basic Pilot a voluntary program (and chose not to pass legislation that would make it mandatory). Arizona has attempted to override those decisions and make the program mandatory. The state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (internal quotation marks omitted). The Act is therefore an improper attempt to legislate in a field occupied by the federal government.

Defendants nonetheless argue that Arizona can mandate participation in the Basic Pilot Program because federal law does not explicitly provide that a state may not do so. Def. Opp. Mem. at 18:16-19. In essence, this argument amounts to a claim that absent *express* preemption, there can be no claim under the Supremacy Clause. That is not the law. "Preemption may be either express or implied." *FMC Corp. v. Holliday*, 498 U.S. 52, 56 (1990). The Act violates the Supremacy Clause by mandating participation in the Basic Pilot Program.

[4] Defendants do not concede that the Basic Pilot Program is experimental and temporary, but the concession on the voluntary nature of the Program is sufficient to find preemption. In any event, defendants do not dispute that the program is experimental, and all they offer to contradict plaintiffs' showing that the Program is temporary is that "[t]he Director [sic] of Homeland Security has favored strengthening and expanding the program." Def. Opp. Mem. at 19 n.14. An administration official's support for the program does not change that the authorization for the program specifically provides that it will terminate in November 2008. Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156 (Dec. 3, 2003).

Moreover, defendants do not dispute that the Act will burden the federal government. Pl. Opening Mem. at 15:12-19; Def. Opp. Mem. at 19:8-9. Their response that this is what the federal government wants (Def. Opp. Mem. at 19:9-10) misses the point that Congress made the Basic Pilot Program voluntary. There is no evidence that Congress wanted to impose on the federal government the costs of increased usage resulting from mandatory participation in the Program. The best evidence – the voluntary nature of the Program – is to the contrary.

2. *Procedural Due Process.* Defendants concede that the Act implicates property interests protected by the Due Process Clause of the Fourteenth Amendment. Def. Opp. Mem. at 21:1-2 ("a business license is a property interest that cannot be revoked without due process of law"). Nor do defendants dispute the rest of plaintiffs' showing with respect to the Act's interference with protected interests. *See* Pl. Supp. Mem. at 2:13-3:11. The only disputed issue is what procedural protections are due.

Defendants' primary argument is that due process is met because, regardless of what determinations are made without notice and a hearing in the course of finding an employer has violated the Act, a judge of the Arizona Superior Court will make the final decision on whether an employer will be sanctioned for intentionally or knowingly employing an unauthorized alien after notice and a hearing. *See* Def. Opp. Mem. at 21:2-23:2. This argument is foreclosed by U.S. Supreme Court case law. In *Bell v. Burson*, 402 U.S. 535 (1971), the Supreme Court addressed a Georgia statutory scheme that provided for a hearing prior to the suspension of drivers' licenses after accidents. At the hearing, the administrative officer could consider evidence on whether the person whose license might be suspended was the person involved in the accident and whether that person had complied with the statute's requirement on providing security to satisfy any judgment for damages resulting from the accident or fell within an exception to the security requirement. *Id.* at 536 n.1, 537-38. But the hearing would not consider who was liable for the accident. *Id.* at 536, 538. The Supreme Court found that because liability was "an important factor" in determining whether to deprive an individual of a driver's license, "the State may not,

consistently with due process, eliminate consideration of that factor in its prior hearing." *Id.* at 541.

Whether an employee is an unauthorized alien is no less important to the Arizona Act's employer sanctions provisions than liability was to Georgia's license suspension scheme. And defendants do not dispute that the Act does not require notice or a hearing before the federal government responds to an inquiry under 8 U.S.C. §1373(c) from Arizona law enforcement seeking to verify the employment authorization of an alleged unauthorized alien. Pl. Supp. Mem. at 4:1-7, 25-28. Nor do defendants dispute that the federal government's response is dispositive as to the alleged unauthorized alien's status for purposes of the Act. *Id.* at 5:3-8. Thus, prior to the opportunity to be heard, a critical element of the Act's enforcement scheme has already been decided. This is precluded by *Bell*.[5] Accordingly, defendants' arguments about how much due process is provided prior to a judicial determination on the "intentional" or "knowing" elements of the Act's employer sanction scheme are beside the point. By then, the critical determination on the employee's status as an unauthorized alien has already been made and cannot be undone.

Notably, defendants do not dispute that 8 U.S.C. §1373(c)'s reference to inquiries from various agencies is aimed at citizenship and immigration status, that employment authorization status is an entirely different question, and that there is not even any indication of how (or whether) the federal government actually verifies citizenship or immigration status pursuant to this provision. *See* Pl. Supp. Mem. at 4:7-28. The Act, however, makes no provision for notice or a hearing prior to the federal government's dispositive determination as to employment authorization status, thus creating a high risk of erroneous determinations.

As a separate reason that the Act violates due process, Congress meant its system of employer sanctions for employing unauthorized workers to be exclusive. Pl. Opening Mem. at 7-13; Pl. Supp. Mem. at 5:26-6:7. Defendants are simply incorrect that "nothing

[5] Defendants' only cite on this point is *In re Hamm*, 211 Ariz. 458 (Ariz. 2005). But no element – let alone an important element – of that case was determined prior to notice and a hearing.

prevents" state courts from making the same determinations that Congress gave to administrative law judges with immigration law expertise and life-tenured federal Court of Appeals judges. Def. Opp. Mem. at 23:7-8. When it comes to employer sanctions for employing unauthorized aliens, Congress has carefully balanced the many issues at stake and did not leave room for each state and locality to come up with its own scheme.

3. *Effect Of The Notice To Employers.* Defendants claim that the case is moot as to the Director of the Department of Revenue because he has sent the notice to employers required by Section 3 of the Act. Def. Opp. Mem. at 1 n.1. To the contrary, plaintiffs are still entitled to declaratory relief that the notice is invalid. Moreover, as the notice has now gone out and informed employers of their purported responsibilities under the Act (Def. Opp. Mem., Exh. 1), should plaintiffs prevail, plaintiffs request the Court to issue an injunction requiring defendants to send a new notice to employers informing them that the Act is no longer valid. Otherwise, employers will be left with a mistaken impression as to their responsibilities. Because the Director of the Department of Revenue would have to send out that notice, the case is not moot as to him for this reason as well.

Finally, it bears mention that the notice demonstrates that plaintiffs are correct about the interrelated nature of the Act's two provisions on the Basic Pilot Program. Pl. Opp. Mot. Dismiss at 7:1-9. The notice addresses the two provisions together and plainly states that employers are "required" to use the Program. Def. Opp. Mem., Exh. 1.

CONCLUSION

For the above reasons and those in the opening and supplemental briefs, the Court should enjoin defendants from implementing or enforcing Sections 2 and 3 of the Legal Arizona Workers Act, require defendants to issue a notice to all employers that the Act is no longer valid, and issue a declaration that Sections 2 and 3 are unlawful and invalid.

Dated: October 19, 2007

Stephen P. Berzon
Jonathan Weissglass
ALTSHULER BERZON LLP

Kristina M. Campbell
Cynthia A. Valenzuela
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

Linton Joaquin
Monica T. Guizar
Karen C. Tumlin
NATIONAL IMMIGRATION LAW CENTER

Daniel Pochoda
ACLU FOUNDATION OF ARIZONA

Lucas Guttentag
Jennifer C. Chang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION – Immigrants' Rights Project

Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION – Immigrants' Rights Project

By: /s/ Jonathan Weissglass
Jonathan Weissglass

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2007, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrants:

Mary O'Grady - Solicitor General
Christopher A. Munns - Assistant Attorney General
Office of the Attorney General
1275 West Washington
Phoenix, AZ 850007-2926
Mary.Ogrady@azag.gov
Chris.Munns@azag.gov
Attorneys for Defendants

David A. Selden
Julie A. Pace
Heidi Nunn-Gilman
Ballard Spahr Andrews & Ingersol
3300 North Central Avenue,
Suite 1800
Phoenix, AZ 85012
Seldend@ballardspahr.com
pacej@ballardspahr.com
Attorneys for Plaintiffs Arizona Contractors Association, et al.

COPY of the foregoing sent by overnight delivery
with Notice of Electronic Filing on October 19, 2007 to:

The Honorable Neil V. Wake
United States District Court
Sandra Day O'Connor U.S. Courthouse
401 West Washington Street
Phoenix, AZ 85003-2158

/s/ Sally Mendez