No. 09-115

In The Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

vs.

MICHAEL B. WHITING, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether federal law expressly preempts Arizona's law authorizing sanctions against licenses of employers that knowingly or intentionally employ unauthorized aliens when 8 U.S.C. § 1324a(h)(2) specifically preserves state sanctions "through licensing and similar laws."

2. Whether Arizona's law authorizing licensing sanctions against an employer is impliedly preempted by federal law even though the sanctions are within the savings clause in 8 U.S.C. § 1324a(h)(2) and Arizona's law is otherwise consistent with IRCA.

3. Whether Arizona's statute requiring employers within the State to use the federal E-Verify program to confirm that new employees are legally authorized to work in this country is impliedly preempted because Congress has not mandated the use of this federal program nationally.

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs/appellants below, are accurately listed in Petitioners' brief. Due to changes in state and county officers and pursuant to Rule 35.3 of the Supreme Court Rules, Respondents, who were defendants/appellees below, are now Michael B. Whiting; Kenny Angle; Melvin R. Bowers Jr.; Sam Vederman; Brad Carlyon; Daisy Flores; William Mundell; Gale Garriott; Terry Goddard; David Rozema; Barbara Lawall; Janice K. Brewer; Sheila Polk; Derek D. Rapier; Ed Rheinheimer; George Silva; Jon Smith; Matthew J. Smith; Richard M. Romley; and James P. Walsh.

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INTRODUCTION

The Legal Arizona Workers Act (the "Act") simply attempts to ensure that workers who are hired by Arizona employers are legally authorized to work in this country. This Court recognized more than thirty years ago in *DeCanas v. Bica,* 424 U.S. 351, 357 (1976), that such legislation is "within the mainstream of [State] police power" and acknowledged that an unlawful work force can significantly impact wages and working conditions for all workers. Arizona's law addresses these problems by (1) providing that the State licenses of employers that knowingly or intentionally employ unauthorized aliens may be suspended or revoked, and (2) requiring all employers to use the federal E-Verify program to confirm that the people they hire are legally authorized workers.

Arizona's employer sanction scheme does not conflict with federal law. When Congress enacted federal employer sanctions in 1986 as part of the Immigration Reform and Control Act ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, it specifically preserved State authority to impose sanctions through licensing and similar laws. Arizona's law is crafted to fall within that savings clause and is modeled after IRCA to ensure that it is otherwise consistent with federal requirements. The employer sanctions law imposes no new obligation on employers, but merely authorizes the suspension or revocation of State-issued business licenses of employers that knowingly or intentionally employ unauthorized aliens – conduct that has been illegal in this country since IRCA's enactment in

1986. Because Arizona's law falls within IRCA's savings clause and is otherwise consistent with federal law, it is not preempted.

Federal law also does not preclude Arizona from requiring employers in that State to use the federal E-Verify program. Although Congress has not made the program's use mandatory on a nationwide basis, federal law does not prohibit a State from making its use mandatory for employers within its boundaries. Congress developed E-Verify to have a more effective employee verification system than the I-9 process that was created when Congress enacted IRCA in 1986. Requiring employers within Arizona to use E-Verify in a manner consistent with the program's purpose does not conflict with federal law. Rather, it furthers the interest of both the State and the federal governments in having an effective employee verification system and a lawful work force in this country.

The Ninth Circuit correctly concluded that federal law does not preempt Arizona's licensing sanctions and E-Verify requirement, and this Court should affirm that decision.

STATEMENT

I. FEDERAL EMPLOYER SANCTIONS AND VERIFICATION REQUIREMENTS.

Until Congress enacted IRCA, federal immigration law did not prohibit employers from hiring unauthorized aliens. *See DeCanas v. Bica*, 424 U.S. at 360 (noting that immigration law showed at best "a peripheral concern with employment of illegal entrants"). In contrast, various States had laws prohibiting the employment of unauthorized aliens within their borders. *See* U.S. Gen. Accounting Office, *PAD 80-22, Illegal Aliens: Estimating Their Impact on the United States*, 46, tbl. 12 (1980).

In its 1976 *DeCanas* decision, this Court recognized that regulating the employment of unauthorized aliens came within the States' traditional police power and that federal law had not displaced this authority. *DeCanas*, 424 U.S. at 357. The Court observed that "[S]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the state," and that regulating the employment of unauthorized aliens fell within that power. *Id.* at 356. Ten years after *DeCanas* affirmed the States' police power to sanction those who employ unauthorized aliens within State borders, Congress enacted IRCA, which made significant changes to the nation's immigration laws and included the first federal law penalizing employers who hire unauthorized aliens. IRCA § 101 (codified as 8 U.S.C. § 1324a).

A. IRCA's Employer Sanctions.

Under IRCA, employers cannot hire, recruit or refer for a fee "for employment in the United States an alien knowing the alien is an unauthorized alien."[1] 8 U.S.C. § 1324a(a)(1)(A). IRCA's employer sanctions provision created a federal administrative hearing process to determine violations and impose civil penalties, which consist mainly of monetary fines. 8 U.S.C. § 1324a(e)(4). IRCA also established criminal penalties for employers who have a pattern or practice of unlawfully employing unauthorized aliens. 8 U.S.C. § 1324a(f)(1). Congress specifically addressed State laws concerning employer sanctions by providing that, "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

Congress intended employer sanctions to reduce illegal immigration. "Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of

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[1] IRCA defines an "unauthorized alien" as an alien who at the time of employment is not "either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." 8 U.S.C. § 1324a(h)(3).

employment." H.R. Rep. No. 99-682(I), at 46 (1986), *reprinted in* U.S.C.C.A.N. 5641, 5650.

B. The I-9 Document Verification Process.

IRCA also created a document-based verification process (called the "I-9" process after the required verification form) in which the employer examines certain identification documents specified by law and then attests to examining them on the I-9 document. 8 U.S.C. § 1324a(b)(1). The employer is not required to determine whether the identification documents are genuine, but may rely on a document if it "reasonably appears on its face to be genuine." 8 U.S.C. § 1324a(b)(1)(A)(iii). The employee must also sign the I-9 form attesting that he or she is either a United States citizen or national or is otherwise authorized to work in the United States. 8 U.S.C. § 1324a(b)(2). The employer must then retain the verification form for a specified amount of time and make it available for inspection by various federal agencies. 8 U.S.C. § 1324a(b)(3). This verification process was an important component of the employer sanctions program: "[A]n effective verification procedure, combined with an affirmative defense for those who in good faith follow the procedure, is essential. Otherwise, the system cannot both be effective and avoid discrimination." H.R. Rep. No. 99-682(I) at 60.

C. The I-9 Process's Shortcomings and Immigration Reform.

In the decade after IRCA's enactment, it became clear that document fraud had undermined the I-9 process. As early as 1990, the General Accounting Office observed that "[w]holly apart from their impact on discrimination, the prevalence of counterfeit and fraudulently obtained documents threatens the security of the IRCA's verification system for prohibiting unauthorized alien employment." U.S. Gen. Accounting Office, *GAO/GDD 90-62*, *Immigration Reform: Employer Sanctions and the Question of Discrimination* 76 (1990). In 1996, a House committee reported that IRCA's employer verification system and sanctions were "riddled with document fraud, and ineffective in deterring both the hiring of illegal aliens and the illegal entry of aliens seeking employment. . . ." H.R. Rep. No. 104-469(I), at 119 (1996); *see also* S. Rep. No. 104-249, at 4 (1996) (observing that "as was feared – there is widespread fraud in [the I-9 process's] use"); *see also* 143 Cong. Rec. E55 (Extension of Remarks, daily ed. Jan. 7, 1997) (statement of Rep. McCollum) ("The primary reason employer sanctions are not working today is the rampant fraud in the documents to prove eligibility to work, specifically the Social Security card.")

And the number of undocumented immigrants was rising. In 1986, an estimated 3.2 million unauthorized aliens lived in the United States. Ruth Ellen Wasem, Cong. Research Serv., *RL 33874*, *Unauthorized Aliens Residing in the United States: Estimates*

Since 1986 at 3 (2009). Although the number dropped to 1.9 million following IRCA's enactment, it rose again to 5.8 million in 1996, nearly doubling the pre-IRCA number. *Id.*

As a result of these concerns, Congress again addressed immigration-related issues in 1996. Landmark welfare reform legislation, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, significantly limited access to public benefits based on immigration status. Pub. L. No. 104-193, §§ 401, 402, 411-412, 110 Stat. 2105, 2261-2265, 2268-2270 (1996). Congress also mandated increased State and federal cooperation regarding immigration enforcement. Two new statutes, 8 U.S.C. §§ 1644 and 1373, required State and federal officials to exchange information about immigration status.

Congress also began the process of improving the employer verification system in 1996 by approving three pilot programs as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Pub. L. No. 104-208, Div. C, § 401, 110 Stat. 3009-546, 655. Congress mandated that four goals guide the pilot program's development and operation: (1) ensuring maximum reliability and ease of use for employers while protecting the underlying information's privacy and security; (2) responding to all inquiries concerning an employee's work authorization from employers participating in the pilot program; (3) preventing any unauthorized disclosure of personal information; and (4) ensuring that the verification system did not cause unlawful discriminatory

practices based on national origin or citizenship. IIRIRA, § 404(d). Of the three pilot programs authorized by that law, only the Basic Pilot program (now called "E-Verify") remains in operation today. Westat, *Findings of the E-Verify Program Evaluation* (2009) ("2009 Westat Report").

D. The Development of E-Verify.

The history of E-Verify has been one of continuous improvement and expansion. When authorized in 1996, the Basic Pilot program was available in five of the seven States that had the highest populations of unauthorized aliens. IIRIRA, § 401(c)(1). Congress initially authorized the program for only four years (IIRIRA, § 401(b)), but it has consistently extended the program's life.[2] It expanded the program in 2003, making it available in all fifty States. Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944 (2003). In 2008, the federal government began requiring any entity that maintained or applied for federal contracts to use E-Verify. 48 C.F.R. § 22.1800-1802 (2009). And beginning in 2006, States began requiring employers to use E-Verify.[3] In response to these changes, U.S.

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[2] Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 547, 123 Stat. 2177 (extending E-Verify to Sept. 30, 2012).

[3] 2007 Ariz. Sess. Laws ch. 279; 2006 Colo. Sess. Laws ch. 340; 2006 Ga. Laws 457; 2008 Miss. Laws ch. 312; 2008 Mo. Laws 85; 2009 Neb. Laws L.B. 403; 2007 N.C. Sess. Laws 259,

(Continued on following page)

Citizenship and Immigration Services' (USCIS) website directs employers to consult State law to determine if their State requires them to use E-Verify. *I am an Employer, How do I . . . use E-Verify* at 1 (2008). USCIS also contracted with the University of Arizona's Center of Excellence for Border Security and Immigra-tion and the Federal Consulting Group "to examine the E-Verify program in a mandatory environment (Arizona)." *Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications* 2 (2010) ("USCIS Synopsis").

E-Verify allows employers to ensure that they are hiring authorized workers by electronically comparing the identification and authorization information that employees provide with information contained in federal Social Security Administration ("SSA") and Department of Homeland Security ("DHS") databases. To participate in E-Verify, the employer must sign a memorandum of understanding that governs the system's operation. U.S. Citizenship & Immigration Servs., *E-Verify User Manual for Employers* (Sept. 2010) ("User Manual"); U.S. Citizenship & Immigration Servs., *E-Verify Memorandum of Understanding for Employers* (2009) ("MOU"). After enrolling in E-Verify, employers must still complete the I-9 verification process, but they also submit the verification form information through a secure internet

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§ 23.1(a); 2007 Okla. Sess. Laws ch. 112; 2008 S.C. Acts 280; 2010 Utah Laws ch. 403; Idaho Exec. Order 2009-10; Minn. Exec. Order 08-01; R.I. Exec. Order 08-01.

connection to be compared with the SSA and DHS databases. User Manual at 13-16.

If the information that the employer submits matches the records in the federal databases, E-Verify immediately notifies the employer that the individual is employment authorized. If the information that the employee has provided does not match the information in the federal databases, E-Verify issues a tentative nonconfirmation. MOU Art. III. Before issuing a tentative nonconfirmation, however, E-Verify will ask the employer to confirm that the information submitted is accurate to avoid inaccurate results based on typographical errors. User Manual at 17. If a tentative nonconfirmation is issued, the employee is notified and given an opportunity to contact SSA or DHS to resolve any potential problem. *Id.* at 27-30 (SSA), 35-38 (DHS). Until there is a final determination, the employer may not terminate the employee for being unauthorized. IIRIRA, § 403(a)(4)(B)(iii). Upon receipt of a final nonconfirmation, an employer may terminate the employee. IIRIRA, § 403(a)(4)(C)(i). An employer who chooses not to terminate the employee must inform DHS and is subject to a rebuttable presumption of having knowingly hired an unauthorized alien. IIRIRA, § 403(a)(4)(C)(i)-(iii).

E-Verify has been the subject of a number of independent evaluations.[4] Most recently, a 2009 independent evaluation concluded that E-Verify was 95.9% accurate in its initial determination regarding employment authorization. USCIS Synopsis at 4; 2009 Westat Report at 116. E-Verify participants reported minimal costs to participate and were generally satisfied with the program. 2009 Westat Report at 169. USCIS has called E-Verify "the best available tool to help employers determine whether their employees are authorized to work in the United States." USCIS Synopsis at 1.

II. THE LEGAL ARIZONA WORKERS ACT.

Over the years, the nation's unauthorized alien population has continued to increase. By 2005, there were approximately 7.2 million unauthorized workers in the United States, representing about five percent of the labor force. Andorra Bruno, Cong. Research Serv., *RL 33973, Unauthorized Employment in the United States: Issues and Options* 1 (April 20, 2007). And by 2007, the number of unauthorized aliens reached an estimated 11.8 to 12.5 million people. Wasem at 3. According to the district court, unauthorized aliens in Arizona's work force "dr[ove] down wages for competing authorized workers." Add19.

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[4] 2009 Westat Report; Westat, *Findings of the Web Basic Pilot Evaluation* (2007) ("2007 Westat Report"); Temple University Institute for Survey Research and Westat, *Findings of the Basic Pilot Program Evaluation* (2002).

In response, on July 2, 2007, Arizona's Governor signed into law the Legal Arizona Workers Act ("the Act"). (Joint Appendix ["JA"] 402-04.) The Act authorized sanctions against the licenses of Arizona employers who knowingly or intentionally employed unauthorized aliens, A.R.S. §§ 23-212, -212.01,[5] and required Arizona employers to use E-Verify, A.R.S. § 23-214. 2007 Ariz. Sess. Laws ch. 279, § 2. Implementation of employer sanctions and the E-Verify requirement began January 1, 2008. A.R.S. §§ 23-212(D), -212.01(D) (limiting sanctions to conduct occurring after January 1, 2008); -214(A) (requiring E-Verify use as of January 1, 2008).

As the Legislature required, before October 1, 2007, the Arizona Department of Revenue mailed notice to employers of the new E-Verify requirement and employer sanctions. 2007 Ariz. Sess. Laws ch. 279, § 3. JA 404-08. Beginning January 1, 2008,

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[5] As originally enacted, the Act contained sanction provisions in a single provision (A.R.S. § 23-212). 2007 Ariz. Sess. Laws ch. 279, § 2. In 2008, the Legislature enacted legislation that amended the Act in several ways. 2008 Ariz. Sess. Laws ch. 152. This legislation separated knowing violations and intentional violations into separate provisions (A.R.S. §§ 23-212, -212.01); provided that businesses would forfeit government economic development incentives if they did not use E-Verify (A.R.S. § 23-214(B)); and created a new voluntary employer compliance program (A.R.S. § 23-215). *Id.* The Legislature further amended the sanction statute in 2010 to add an affirmative defense for entrapment (A.R.S. §§ 23-212(K), -212.01(K)) and to add a record-retention requirement for employee verifications (A.R.S. § 23-214). 2010 Ariz. Sess. Laws ch. 113, §§ 7-9.

Arizona's Attorney General and county attorneys began investigating any complaints that they received concerning the employment of unauthorized aliens.

A. The Sanction Statute.

The Act's employer sanctions provision was drafted to ensure consistency with federal law. For example, the Act:

- incorporates the IRCA definition of "unauthorized alien," A.R.S. § 23-211(11);
- requires that the phrase "knowingly employ an unauthorized alien" "be interpreted consistently with 8 [U.S.C.] § 1324a and any applicable federal rules and regulations," A.R.S. § 23-211(8);
- authorizes sanctions only against employer licenses so that the sanctions are within IRCA's savings clause that preserved State authority to impose sanctions "through licensing and similar laws," A.R.S. § 23-212(F), -212.01(F); 8 U.S.C. § 1324a(h)(2);
- incorporates the federal rebuttal presumption that the employer did not knowingly or intentionally employ an unauthorized alien if the employer verified the employee's employment authorization through the federal E-Verify program, A.R.S. §§ 23-212(I), -212.01(I); IIRIRA, § 402(b), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546, 656-57;

- replicates the federal affirmative defense for employer sanctions if the employer "complied in good faith" with the I-9 system, A.R.S. §§ 23-212(J), -212.01(J); 8 U.S.C. § 1324a(a)(3).

It also establishes requirements for processing complaints. The Arizona's Attorney General and county attorneys may investigate complaints that an employer has knowingly or intentionally employed an unauthorized alien. A.R.S. §§ 23-212(B), -212.01(B). It prohibits authorities from investigating complaints based "solely on race, color or national origin." *Id.* In investigating and prosecuting complaints under the sanction statutes, State officials must rely on information obtained from the federal government pursuant to 8 U.S.C. § 1373(c) to establish the employee's immigration status. A.R.S. §§ 23-212(B), (H); -212.01(B), (H). Although the Attorney General has joint investigative authority, only county attorneys may bring enforcement actions under the sanction statute. A.R.S. §§ 23-212(D), -212.01(D). If an investigation shows that a complaint is not frivolous, the investigating official must notify federal immigration authorities and the local law enforcement agency of the unauthorized alien, and in the case of a complaint filed with the Attorney General, must notify the appropriate county attorney. A.R.S. §§ 23-212(C), -212.01(C).

A county attorney must file an action in State court to impose sanctions against an employer. A.R.S. §§ 23-212(F), -212.01(F). These actions are governed generally by the Arizona Rules of Civil Procedure and

specifically by Rule 65.2, which the Arizona Supreme Court adopted to address the requirements of the sanction statutes. These rules require that the complaint identify the licenses at issue and specify the "facts alleged to show that one or more employees are unauthorized aliens" and the "facts alleged to show that the employer intentionally or knowingly employed one or more unauthorized aliens." Ariz. R. Civ. P. 65.2(B).

The Act defines "license" as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state." A.R.S. § 23-211(9)(a). It includes in the definition articles of incorporation, certificates of partnership, foreign corporation registrations, and transaction privilege (sales tax) licenses, but excludes from it licenses issued under title 45 (governing water), title 49 (governing the environment), and any professional license. A.R.S. § 23-211(9)(b), (c). Employers found to have violated the sanction statutes have the same appeal rights and other procedural protections that exist for other civil actions. A.R.S. § 12-2101(B).

Arizona's sanction statute creates a tiered system of licensing penalties for adjudicated violations. For a first knowing violation, the court may, in its discretion, suspend the business licenses for up to ten days after considering various factors, such as the number of unauthorized aliens employed, the duration of the violation, prior misconduct, and the degree of harm

resulting from the violation. A.R.S. § 23-212(F)(1)(d). A first knowing violation also requires a three-year probationary term during which the employer must file quarterly reports for all new hires. A.R.S. § 23-212(F)(1)(b). A first intentional violation results in the mandatory suspension of an employer's business licenses for a minimum of ten days and a probationary period of five years. A.R.S. § 23-212.01(F)(1)(b), (c). In addition, for any first violation, the employer is required to terminate the employment of all unauthorized aliens and file an affidavit indicating that the employer has taken this action within three days of the court's order. A.R.S. §§ 23-212(F)(1)(a); -212.01(F)(1)(a). If the employer does not file the affidavit with the court in three days, the employer's licenses are suspended until the affidavit is filed. *Id.* For a second knowing or intentional violation during the probation period, business licenses are permanently revoked. A.R.S. §§ 23-212(F)(2); -212.01(F)(2).[6]

[6] As of this date, only three enforcement actions have been filed against Arizona employers under the Act. *See State of Arizona v. Waterworld Ltd. P'ship*, No. CV2009-038848 (Maricopa Cnty. Super. Ct. filed Dec. 21, 2009) (resolved by consent judgment); *State of Arizona v. Danny's Subway Inc.*, No. CV2010-005886 (Maricopa Cnty. Super. Ct. filed March 9, 2010) (resolved by consent decree); *State of Arizona v. Scottsdale Art Factory, LLC*, No. CV2009-036359 (Maricopa Cnty. Super. Ct. filed Nov. 18, 2009) (pending).

B. The E-Verify Requirement.

To help prevent the employment of unauthorized aliens, Arizona also requires employers to use the federal government's E-Verify program to confirm that newly hired employees are authorized to work in this country. A.R.S. § 23-214(A). Initially, the only consequence for failing to verify the employment authorization status of new hires through E-Verify was the loss of the rebuttable presumption set forth in A.R.S. § 23-212(I). In 2008, the Legislature amended the verification statute so that a business must participate in E-Verify to receive economic development incentives from government entities. A.R.S. § 23-214(B). An employer applying for an economic development incentive must provide proof to the government entity that it has enrolled and is participating in E-Verify. *Id.* If the government entity determines that an employer failed to participate in E-Verify after receiving an economic development incentive, the employer may be required to repay all the monies that it has received. *Id.* An "economic development incentive" includes "any grant, loan or performance-based incentive from any government entity that is awarded after September 30, 2008," but it does not include "any tax provision under title 42 or 43." A.R.S. § 23-214(B)(1). The names of Arizona's employers participating in E-Verify are available on the Arizona Attorney General's Office website, and that list is updated quarterly. A.R.S. § 23-214(C).

III. PROCEEDINGS BELOW.

On August 29, 2007, the Petitioners filed the first of two consolidated actions challenging the Act in the District of Arizona. JA 223-66; 267-85. After the district court dismissed the first cases based on lack of jurisdiction because the State defendants lacked authority to enforce the Act, Pet. App. 126a, the Petitioners re-filed their complaints adding the county attorneys as defendants and asserting the same legal challenges. JA 291-344; 345-66.

On February 7, 2008, the district court entered judgment in Respondents' favor. Pet. App. 94a. It found that IRCA did not expressly preempt the sanction statute. "The Act's definition of license does not depart from common sense or traditional understandings of what is a license. . . . It therefore falls within the plain meaning of IRCA's savings clause" preserving State authority to impose sanctions through licensing and similar laws. Pet. App. 62a. The district court also found that the State could impose sanctions without a prior federal adjudication because IRCA's plain language contained no such restriction. Pet. App. 64a. It further disagreed with Petitioners' narrow interpretation of the savings clause, noting that "Congress passed employer sanctions provisions that expressly preempt only some state powers and expressly preserve other state powers. It allowed complementary enforcement by States through 'licensing and similar laws.'" Pet. App. 73a. It also found that the sanction statute did not conflict with Congress's purposes and objectives because it did not

impose stricter standards of conduct than federal law did or undermine the federal adjudication system. Pet. App. 78a-80a.

The district court also found that the verification statute did not conflict with federal law. It noted that IIRIRA prohibited only the Attorney General (now the Secretary of DHS) from requiring the use of E-Verify and that without more, this prohibition does not "raise an inference that Congress intended to prevent the states from mandating use of the system in their licensing laws." Pet. App. 83a. The district court also concluded that A.R.S. § 23-214's requirement of using E-Verify did not create an obstacle to Congress's purposes and objectives because "[f]ederal policy encourages the utmost use of E-Verify" and the Act "effectively increases employer use of the system with no evidence of surpassing logistical limits." Pet. App. 85a.

On September 17, 2008, the Ninth Circuit issued a decision affirming the district court, Pet. App. 26a, which it then amended on March 9, 2009, Pet. App. 1a. Citing this Court's decision in *DeCanas*, the court concluded that regulating the employment of unauthorized aliens was within the States' historic police power and was therefore subject to a presumption against preemption absent clear preemptive intent by Congress. Pet. App. 15a-16a. The court then turned to Petitioners' two preemption claims.

The court first found that IRCA did not preempt the sanction statute because the Act's "broad definition of 'license' is in line with the terms traditionally used and falls within the savings clause." Pet. App. 17a. It did not find any support for Petitioners' contention that the savings clause encompassed "only licenses to engage in specific professions, such as medicine or law, and not licenses to conduct business." *Id*. And it disagreed with Petitioners' claim that a federal adjudication was a prerequisite to State sanctions because IRCA's legislative history clearly recognized the ability of a State to "condition an employer's 'fitness to do business' on hiring documented workers." Pet. App. 18a.

With regard to E-Verify, the court found that the verification statute did not conflict with federal law and agreed with the district court's conclusion that "while Congress made participation in E-Verify voluntary at the national level, that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory." Pet. App. 20a. Congress did not expressly preempt State activity in the area of employee verification, although it demonstrated that it knew how to do so in enacting the preemption clause in IRCA's sanction provisions. *Id.* Finding no express preemption, the court examined whether the verification statute constituted an obstacle to accomplishing Congress's full purposes and objectives and decided that it did not: "Though Congress did not mandate E-Verify, Congress plainly envisioned and endorsed an increase in its usage.

The Act's requirement that employers participate in E-Verify is consistent with and furthers this purpose, and thus does not raise conflict-preemption concerns." Pet. App. 21a. The Petitioners requested rehearing en banc, which the court denied on March 9, 2009. JA 146, 166, 184, 202, 220.

SUMMARY OF ARGUMENT

1. Although the federal government is responsible for regulating immigration, there remains room for State legislation that touches on immigration issues. This is particularly true in the area of employment. As this Court recognized in *DeCanas*, "[S]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." 424 U.S. at 356. Employment of unauthorized aliens may deprive citizens and authorized noncitizens of jobs and depress wages and working conditions. *Id.* Because State laws addressing unauthorized workers are "within the mainstream of [State] police power," *id.,* federal law preempts those laws only if "the clear and manifest purpose of Congress would justify that conclusion." *Id.* at 357 (internal quotation marks omitted).

Congress recognized the need to preserve State authority to address unauthorized employment when it enacted IRCA in 1986. In IRCA, Congress approved the first federal sanctions against employers that hire

unauthorized aliens. Although it preempted State authority to impose civil and criminal sanctions against employers, it specifically preserved State authority to impose sanctions "through licensing and similar laws." 8 U.S.C. § 1324a(h)(2). This division of authority respects the State's traditional responsibility over State licenses but gives the federal government the exclusive authority to impose other types of sanctions against employers who hire unauthorized aliens.

Arizona's law authorizing the suspension and revocation of State licenses of an employer that has knowingly or intentionally employed unauthorized aliens fits easily within the savings clause that Congress enacted in IRCA. Arizona's law is also otherwise consistent with IRCA's requirements. It adopts the federal definition of unauthorized alien, A.R.S. § 23-211(11), relies on the federal scienter requirement, A.R.S. § 23-211(8), and incorporates defenses for the use of E-Verify and good faith compliance with the I-9 procedures that are in federal law, A.R.S. §§ 23-212(I), (J), -212.01(I), (J). It also requires that State officials rely on information from the federal government to establish whether a person is an unauthorized alien. A.R.S. § 23-212(B), (H), -212.01(B), (H).

Arizona's law includes measures to prevent abuses. Law enforcement officials are responsible for any investigations, and no complaint based on "race, color or national origin" may be investigated. A.R.S. §§ 23-212(B), -212.01(B). In addition, criminal penalties are

established for "false and frivolous" complaints. *Id.* Sanctions are imposed in civil proceedings in State court where the parties have the usual procedural protections and appeal rights.

The Court of Appeals correctly concluded that IRCA does not preempt Arizona's employer sanctions law. IRCA does not expressly preempt Arizona's sanctions law because it imposes sanctions that are within IRCA's savings clause for sanctions through "licensing and similar laws." 8 U.S.C. § 1324a(h)(2). Arizona's law defines license to include various forms of permission or authorization that are "required by law and that [are] issued by any agency for operating a business in this state." A.R.S. § 23-211(9). It specifically includes articles of incorporation, certificates of partnership, and authority for foreign entities to transact business in the State. *Id.* Each of them constitutes "a right or permission granted in accordance with law by a competent authority to engage in some business or occupation" – the definition of license accepted by all parties in this case.

Although Petitioners complain that Arizona's definition of license is too broad to fit within IRCA's savings clause, as the court of appeals correctly concluded, Arizona's law is consistent with the traditional definition of "license." Pet. App. 40a. Nor does Arizona's law fall outside the savings clause because it addresses the suspension and revocation of licenses but not the issuance of licenses. Sanctions through licensing laws logically includes the suspension and revocation of State licenses, and a State need not

address issuance and revocation in the same statute to fall within the savings clause.

Petitioners propose various restrictions on State authority to suspend and revoke State licenses, but none of them are supported by IRCA's text. The savings clause is not, for example, limited to specific types of licenses such as those for farm labor contractors. Nor does IRCA require a federal adjudication against an employer for IRCA violations before a State can take action against that employer's license.

The legislative history also does not support Petitioners' effort to restrict the plain language of IRCA's savings clause. They argue that a House Report supports requiring a prior federal adjudication as a prerequisite to State sanctions against a licensee. It says that IRCA does not intend to preempt State laws that "require [the] licensee . . . to refrain from hiring, recruiting or referring undocumented aliens." H.R. Rep. No. 99-682(I) at 58. It also refers to "lawful state or local processes," for the suspension or revocation of licenses. The Report does not support Petitioners' attempt to limit the reach of the savings clause. Even if the Report could be read to support Petitioners, principles of statutory construction preclude a House Report from altering the plain language that Congress enacted.

2. IRCA also does not preempt the sanctions statute under implied conflict preemption principles. Although IRCA established a federal enforcement

scheme, the existence of a federal enforcement scheme for federal sanctions does not preclude State enforcement actions for sanctions within the savings clause. To the contrary, imposing such a requirement undermines the savings clause by substantially restricting a State's ability to impose sanctions against its licensees when it deems appropriate. It also intrudes on State sovereignty by preventing a State enforcement against a State licensee unless the federal government has completed its own enforcement action against that entity. There is no evidence Congress intended such a significant limitation on State authority.

Arizona's law does not disrupt the balance that Congress struck when it enacted IRCA. The savings clause for sanctions through "licensing and similar laws" is part of the balance that Congress struck. Arizona's law also does not undermine IRCA's protections against discrimination. While Arizona did not include an anti-discrimination remedy, it does not undermine any of the protections available under State and federal law. It also does not create new burdens for employers that conflict with IRCA. Although Arizona provides significant penalties for knowingly or intentionally employing unauthorized aliens, they are sanctions that Congress preserved for the State through the savings clause.

3. Arizona's E-Verify requirement is also not preempted. Although E-Verify is not mandatory nationally, and Congress expressly prohibited the Secretary of the DHS from requiring its use, Congress

has not addressed whether States may require employers within their boundaries to use the program. Implied conflict preemption principles do not preclude a State E-Verify requirement. As an initial matter, it is not impossible to comply with both a State E-Verify requirement and federal law. An employer who uses E-Verify to comply with Arizona law would not be in violation of federal law.

Second, requiring E-Verify does not pose an obstacle to federal goals. Congress directed the development of this electronic verification system in direct response to the failures of the I-9 process. The Congressional objective was to develop a more effective verification system to help ensure that employers do not hire unauthorized workers. Requiring employers to use the program should advance these goals by increasing participation. As the United States amicus brief indicated, the increased workload does not burden the federal program, which can handle the additional workload from the State E-Verify requirements.

The consequences for an Arizona employer who does not participate in E-Verify are similar to the consequences under federal law. Arizona law provides no direct sanction, but the employer loses the benefit of a rebuttable presumption in an enforcement action, and the employer cannot receive government contracts or other economic incentives from governmental entities. This type of requirement does not create an obstacle to the federal goals of the E-Verify program.

For these reasons, the Court of Appeals decision correctly concluded that Arizona's employer sanctions law and E-Verify requirement are not preempted.

ARGUMENT

I. FEDERAL LAW DOES NOT PREEMPT ARIZONA'S EMPLOYER SANCTIONS LAW.

Although the "power to regulate immigration is unquestionably exclusively a federal power," State laws that touch on immigration issues are not per se preempted. *DeCanas*, 424 U.S. at 354. States may enact legislation that affects immigrants and immigration-related matters provided they comply with the relevant constitutional principles. *See, e.g., Plyler v. Doe,* 457 U.S. 202, 226 (1982) (recognizing that a State may "borrow" the federal classification concerning who is not legally in this country and analyzing the State's use of this classification under equal protection requirements); *DeCanas,* 424 U.S. at 355 (applying preemption analysis to determine constitutionality of California law prohibiting employment of unauthorized workers).

While delineating the parameters of State authority, this Court has recognized the important State interests that the problem of illegal immigration affects. In *DeCanas*, this Court acknowledged that State legislation concerning the employment of unauthorized aliens was in the "mainstream of [state] police power." 424 U.S. at 356. The Court recognized

that illegal immigration may "deprive[ ] citizens and legally admitted aliens of jobs . . . [and] depress wage scales and working conditions of citizens and legally admitted aliens" and acknowledged the States' interest in addressing "local problems" that may result from a work force that is not authorized to work in this country. *Id*. at 356-57. In *Plyler v. Doe,* this Court again acknowledged the State's interest in immigration-related legislation:

> [a]lthough the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service. Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns. *See DeCanas v. Bica,* 424 U.S. at 354-56.

Plyler, 457 U.S. at 228 n.23.

Congress has also recognized the impact of unlawful immigration on States and the important role States play in addressing its consequences. For example, Congress has enacted legislation to reimburse States for the costs of incarcerating unlawful immigrants who have been imprisoned for violations of State criminal laws, 8 U.S.C. § 1231(i),

to generally preclude immigrants who are not lawfully within this country from receiving State and local public benefits, 8 U.S.C. § 1621, and to mandate federal and State cooperation and communication regarding immigration issues, 8 U.S.C. §§ 1373, 1644.

IRCA, too, reflects Congress's recognition of the continuing role States play in this area. In adopting the first-ever federal law penalizing employers for hiring unauthorized aliens, Congress could have expressly preempted States from that entire field. Congress likewise could have expressly preempted States from investigating and adjudicating employers' alleged hiring of unauthorized aliens. And Congress could have expressly preempted States from imposing any sanctions for employers' violations of federal immigration laws. It did none of those things. To the contrary, IRCA is silent on State investigations and adjudications of employers' misconduct, and expressly preserves the States' authority to impose "sanctions . . . through licensing and similar laws." 8 U.S.C. § 1324(a)(h)(2).

By authorizing States to sanction employers through license denials and revocations, IRCA ensures that the full panoply of sanctions is available against employers who illegally hire unauthorized aliens. While the federal government is fully capable of imposing civil fines and criminal penalties, the revocation of State-issued licenses is peculiarly within the province of the States themselves. IRCA's savings clause preserves States' longstanding power to regulate business entities to which State licenses

were issued and States' traditional power to revoke licenses to do business as a sanction for violating immigration laws.

The Act falls squarely within IRCA's savings clause. The law provides for the revocation or suspension of State-issued licenses. And to be consistent with federal law, it uses the federal definition of unauthorized alien, A.R.S. § 23-211(11), adopts federal scienter standards, incorporates a defense for good faith compliance with the I-9 process, A.R.S. §§ 23-212(J), -212.01(J), and establishes a rebuttable presumption that a worker is lawful if the employer uses the E-Verify program, A.R.S. § 23-212(I), -212.01(I). The Arizona law is a permissible complement to federal enforcement efforts, and is consistent with the plain language, structure, and history of IRCA.

A. Federal Law Does Not Expressly Preempt Arizona's Employer Sanctions Statute.

1. Arizona's Statute Is Consistent with the Plain Language of IRCA's Savings Clause.

a. The express-preemption analysis "'must in the first instance focus on the plain wording of the [preemption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Sprietsma v. Mercury Marine,* 537 U.S. 51, 62 (2002) (quoting *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993)). That principle is a straightforward

application of the more general rule that statutory construction "begins with the plain language of the statute." *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009). The preemption clause at issue here provides:

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

8 U.S.C. § 1324a(h)(2) (emphasis added). Congress thereby preempted States from imposing "civil and criminal sanctions" on employers, but specifically preserved State authority to impose sanctions "through licensing and similar laws."

The plain meaning of "licensing and similar laws" encompasses a law that revokes a business's State-issued authorization to do business in the State. Although Petitioners denigrate the use of dictionaries to determine the plain meaning of a statute, *see* Pet. Br. 27, that is the standard means of doing so when a term is not defined. *See, e.g.*, *Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010); *Smith v. United States*, 508 U.S. 223, 228-229 (1993). Both Petitioners and the United States cite *Webster's Third New International Dictionary* 1304 (1993), which defines the term "license" as a "right or permission granted in accordance with law by a competent authority to engage in some business or occupation." The "licenses" subject to revocation under Arizona's law – "any agency permit, certificate, approval, registration,

charter or similar form of authorization that is required by law and that is issued . . . for the purposes of operating in the business in this state," including articles of incorporation, certificates of partnership, foreign corporation registrations, and transaction privilege licenses, A.R.S. §§ 23-211(9)(a), (b) – fall comfortably within that definition.

To become authorized to do business as an Arizona corporation, an entity must file articles of incorporation with the Arizona Corporation Commission, A.R.S. § 10-201, and thereby subject itself to the longstanding sanction of dissolution, through administrative or judicial proceedings, for certain violations of law. A.R.S. §§ 10-1420 to -1422 (administrative dissolution); 10-1430 to -1434 (judicial dissolution). As this Court has observed, it "is an accepted part of the business landscape for States to create corporations [and] to prescribe their powers." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987); *see also Trs. of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it. . . ."). Put another way, State-issued articles of incorporation are "a right or permission granted in accordance with law by a competent authority to engage in some business or occupation." *See Webster's Third New International Dictionary* at 1304.

Business entities must likewise file certificates of partnership, A.R.S. § 23-211(9)(b)(ii), foreign corporation registrations, A.R.S. § 10-1503, and transaction privilege licenses, A.R.S. § 42-5008 to obtain the authority to engage in specified conduct within Arizona and to receive certain protections that Arizona law provides. Indeed, this Court has often referred to State-issued registrations to transact business as a foreign corporation as "licenses." *See, e.g.*, *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 417 (1984); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 413 n.8 (1982); *Eli Lilly & Co. v. Sav-on-Drugs, Inc.*, 366 U.S. 276, 282 (1961); *see also Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 899 (1988) (Rehnquist, C.J., dissenting) (referring to State's "licensure of a foreign corporation").

All told, the sanction of revoking various forms of authorization to do business in the State that Arizona's law imposes fall within the plain meaning of the savings clause in 8 U.S.C. § 1324a(h)(2). Several additional considerations buttress that conclusion. First, when Congress has intended to limit a measure to a specific type of license, it has expressly done so. *See, e.g.,* 8 U.S.C. § 1621(c) (defining "state and local public benefit" subject to eligibility restrictions based on immigration status to include "professional and commercial licenses"); 42 U.S.C. § 666(a)(16) (requiring that States have procedures to restrict "driver's licenses, professional and occupational licenses, and recreational and sporting licenses" of people owing child support). Second, the savings clause covers

"licensing *and similar laws*," 8 U.S.C. 1324a(h)(2), indicating an intent broadly to cover documents or laws that provide employers permission to engage in certain activities.

Third, the presumption against preemption dictates that the preemption analysis begin "'with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was a clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). Accordingly, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). This Court recognized in *DeCanas* that the presumption applies in this precise context, 424 U.S. at 357, and IRCA's enactment "does not negate [its] operation. . . . The applicability of the presumption turns on a state's *historic* police powers. By definition, that means that the presumption depends on the *past* balance of state and federal regulation, not the present." *Lozano v. City of Hazleton*, No. 07-3531, 2010 WL 3504538, at *29 (3d Cir. Sept. 9, 2010). Even if the phrase "licensing and similar laws" were ambiguous – and it is not – any ambiguity must be resolved in the State's favor.

b. Petitioners and their amici's efforts to overcome that plain language and presumption are unavailing. First, Petitioners and the United States argue that Arizona's law is not a "licensing law" within IRCA's savings clause because it is not part of a statutory scheme through which licenses are issued. Pet. Br. 34-35; U.S. Br. 10-12. It is difficult to fathom, however, how a State law that specifically addresses the *revocation* of a license is any less a "licensing and similar law" than a State law that specifically addresses the *issuance* of a license. It cannot be that IRCA permits a State to deny a license to a business entity based on that entity's past hiring of unauthorized aliens, but does not permit a State to revoke a license for that same reason. At bottom, their objection appears to be about the organization of Arizona's State code in which the State's power to revoke various licenses appears in a different section than the sections in which the State's power to issue those licenses is specified. It is commonplace, however, that the substance of State law, and not its form, controls. *See United States v. Eurodif S.A.*, 129 S. Ct. 878, 887 (2009) ("in reading regulatory and taxation statutes, form should be disregarded for substance") (internal quotation marks omitted). It does not matter whether the sanctions against various licenses are established through a single statute, as Arizona has chosen to do, or by amendments to the various statutes governing specific licenses.

Second, and relatedly, the United States argues that the licenses that Arizona's law covers are not within the savings clause because they pertain to the entity's "very *existence*," whereas a business that loses its license remains a "going concern." U.S. Br. 15-16. The consequence of losing a critical business license that requires a cessation of the company's operations, however, is similar to a suspension or revocation of articles of incorporation. Although theoretically a business that loses its license may remain a "going concern," it cannot do the business that it was established to do. A law or medical practice whose members have lost their licenses to practice law or medicine might still *exist*, and its members might find some other way to earn a living. But it would be passing strange to characterize their new jobs as part of a "going concern" in any way connected to their previous work.

Finally, Petitioners insist that the savings clause authorizes a State to impose sanctions only after a *federal* tribunal has determined that the employer violated IRCA by hiring an unauthorized alien. Pet. Br. 28-30. Not a single word in IRCA imposes that limitation on a State's exercise of the powers that the savings clause preserved. The savings clause itself, of course, says nothing of the sort. Any suggestion that Congress *expressly* preempted States from investigating and adjudicating whether State entities are

unlawfully hiring unauthorized aliens as a predicate to applying a licensing sanction is untenable.[7]

2. IRCA's Purpose and History Support the Conclusion that It Does Not Preempt Arizona's Employer Sanctions Law.

The savings clause ensures that a full range of sanctions is available to be used against businesses that employ unauthorized aliens. IRCA authorizes the federal government to impose civil fines and criminal sanctions against employers that knowingly employ unauthorized aliens, while leaving to the States their uniquely sovereign power to revoke or suspend State-issued licenses. *See Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 336-38 (1935) (holding that the dissolution of State-chartered corporations is a matter of State law and that the Tenth Amendment bars Congress from authorizing a federal agency to dissolve such corporations "in other ways and for other causes" than State law permits); *United States v. Snyder*, 852 F.2d 471, 474-75 (9th Cir. 1988) (invalidating on Tenth Amendment grounds portion of federal sentence requiring surrender of State-issued driver's license). By leaving licensing sanctions to the States, Congress retained that important penalty for

[7] Petitioners' contention that States are *impliedly* preempted from investigating and adjudicating whether employers have violated IRCA by hiring unauthorized aliens is separately addressed in § I(B), *infra*.

wrongdoing while sidestepping any potential constitutional objections and avoiding "upset[ting] the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

The United States nonetheless contends that "it would be exceedingly odd for Congress to have precluded [States from imposing] small fines but permitted sanctions that suspend or terminate a business entity's very existence." U.S. Br. 22-23. But Petitioners' position has that effect, however, for it allows (for example) a State to revoke a doctor's license to practice medicine – thereby depriving him of his profession – yet bars the State from imposing a $10 fine upon the doctor. Congress did not divide sanctions so that the federal government got to impose the large ones and the States the small ones. It divided sanctions responsibility by category, allowing States and local governments to impose licensing sanctions large and small. *See also Lozano*, 2010 WL 3504538, at *31 ("Nowhere in IRCA's text or legislative history is there an indication that Congress intended [the savings clause] to apply only to licensing laws that impose minor penalties, and not to licensing laws that impose more significant sanctions.").

IRCA's history also supports the conclusion that IRCA does not preempt Arizona's law. Congress considered employer sanctions for several years before it enacted IRCA in 1986, but it did not include the express preemption provision with a savings clause until the bill was introduced in 1985. 131

Cong. Rec. 13,590 (1985). The only discussion of preemption of State employer sanctions is found in the House Judiciary Committee Report:

> The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens.
>
> They were not intended to preempt or 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. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. Rep. No. 99-682(I) at 58.

Petitioners assert that this passage and the relationship between IRCA and the Migrant and Seasonal Agricultural Workers Protection Act (AWPA), 29 U.S.C. §§ 1801 to 1872 show that (1) Congress intended the savings clause to embrace only "fitness-to-do-business laws governing farm labor contractors" and similar laws and (2) Congress intended that a federal proceeding must occur before a State can impose licensing sanctions. Of course, Congress's "authoritative statement is the statutory text, not the

legislative history." *Exxon Mobil Corp. v. Allapatah Servs., Inc.,* 545 U.S. 546, 568 (2005); *see also Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 150 n.4 (2002) (describing House Report No. 99-682 as a "single Committee Report from one House of a politically divided Congress" and noting that the dissent's reliance on the report "is a rather slender reed"). In any event, Petitioners' arguments fail on their own terms.

a. To be sure, the House Report specifies farm labor contractor laws as an example of a non-preempted State licensing law. But the Report did not state, or even imply, that such laws – or substantially identical laws – constitute the sum and substance of the exception. To the contrary, the sentence discussing farm labor contractor laws begins with the word "further" and follows a sentence that more generally states that the preemption clause was "not intended to preempt or 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." It is difficult to imagine a broader description of the "licensing and similar laws" carve-out.

Nor does IRCA's relationship with AWPA suggest a narrow, atextual reading of the savings clause. IRCA included "conforming amendments" that permitted the Secretary of Labor to suspend, revoke, or refuse to issue a federal farm labor contract certificate if the employer had been found to violate IRCA. IRCA § 101(b)(1)(B) (codified at 29 U.S.C. § 1813ll(a)).

Under the amendments, the procedures under IRCA, rather than a separate proceeding at the Department of Labor, determine whether a farm labor contractor has unlawfully employed an unauthorized alien. *Id.* This bears on the meaning of the savings clause, Petitioners insist, because AWPA (and its predecessor) imposed a federal licensing regime upon farm labor contractors and expressly provided that "compliance with this chapter shall not excuse any person from compliance with appropriate State law and regulation." 29 U.S.C. § 1871. According to Petitioners, IRCA's savings clause was designed to ensure that States may continue to impose "State law and regulation[s]" on farm labor contractors, and on no other State license. Pet. Br. 32-34.

As an initial matter, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Congress did not limit the savings clause to "farm labor contractors" or to "fitness-to-do-business" laws; it covers all "licensing and similar laws." Moreover, the evidence that Congress adopted the savings clause solely or primarily to preserve existing State licensing laws relating to farm labor contractors is exceedingly thin. All Petitioners can point to is the pre-IRCA existence of AWPA's antipreemption provision (which itself was not limited to licensing measures) and the above-quoted passage from the House Report, which, as noted, describes the exception in far broader terms. In the end, nothing in IRCA's

amendments to AWPA supports the conclusion that Congress intended to preempt the States' ability to revoke or suspend employers' licenses, including articles of incorporation and similar State authorizations.

b. In support of their contention that the savings clause authorizes a State to impose sanctions only after a federal tribunal has found an IRCA violation, Petitioners point to the sentence in the House Report stating that the preemption provision was "not intended to preempt or 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*." H.R. Rep. No. 99-682(I) at 58, *quoted in part in* Pet. Br. 29. That sentence is perfectly consistent with the State's construction of the savings clause. It expressly authorizes "state or local processes." It merely notes that a State may impose a license sanction only upon a person who has been found to have violated IRCA. The House Report does not declare that the violation has to have been determined through a federal adjudication. Any ambiguity regarding authorization for State adjudication is resolved by the next sentence that preserves State laws "which specifically require such licensee or contractor to refrain from hiring, recruiting, or referring undocumented aliens." H.R. Rep. No. 99-682(I) at 58. Arizona's law operates in precisely that fashion. An Arizona employer is subject to sanction only if it knowingly or intentionally hires an "unauthorized

alien," A.R.S. §§ 23-212, -212.01, which is defined to "mean[ ] an alien who does not have the legal right or authorization under federal law to work in the United States as described in 8 [U.S.C. §] 1324a(h)(3)."

The only confusing note is that the Report speaks of "violat[ing] the *sanctions* provision in this legislation." Given that employers are subject to, and can only violate, the *substantive* provisions of IRCA (thereby subjecting themselves to the statute's sanctions), the best reading of the Report's language is that it describes States' authority to invoke their processes to impose licensing sanctions on entities that have knowingly employed unauthorized aliens. At worst, the House Report is ambiguous – and therefore does not advance Petitioners' countertextual claim that a federal proceeding must precede a State licensing sanction.

Because Congress preserved State authority to impose sanctions through "licensing and similar laws," federal law does not expressly preempt Arizona's employer sanctions law that provides for the suspension and revocation of State licenses. The savings clause and the express preemption provision ensure that a range of sanctions against businesses that employ unauthorized aliens are available. Consequently, the federal government may impose the civil and criminal sanctions against employers that knowingly employ unauthorized aliens, and States may revoke or suspend State-issued licenses.

B. Arizona's Employer Sanctions Law Does Not Impliedly Conflict with Federal Law.

Implied conflict preemption exists "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Spreitsma,* 537 U.S. at 65. It requires an "actual conflict." *English v. Gen. Elec. Co.,* 496 U.S. 72, 90 (1990) (internal quotation marks omitted). Tension between federal and State law is not enough to establish implied conflict preemption. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 256 (1984).

Petitioners and the United States assert that Arizona's law impliedly conflicts with IRCA by imposing the sanction of revoking or suspending business licenses, by authorizing State officials and bodies to investigate and adjudicate claims, and by "disrupt[ing] the careful balance that Congress struck." Pet. Br. 37. None of those claims can be reconciled with the scope of State authority Congress expressly reserved, with Congress's refusal to expressly preempt State authority beyond the power to impose civil and criminal sanctions, and with the Arizona law's careful incorporation of myriad federal laws and standards.

1. The State's Authority to Impose Sanctions that are Against State Licenses Does Not Disrupt the Balance That Congress Struck in IRCA.

The savings clause for State sanctions "through licensing and similar laws" is part of the careful balance of competing interests that Congress struck when it enacted IRCA. Although a savings clause does not altogether eliminate the possibility of implied conflict preemption, its existence strongly reflects Congress's decision about the scope of State authority regarding employer sanctions. *Freightliner Corp. v. Myrick,* 514 U.S. 280, 288 (1995) ("[A]n express definition of the preemptive reach of a statute 'implies' – *i.e.,* supports a reasonable inference – that Congress did not intend to pre-empt other matters."); *Cipollone v. Liggett Group,* 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted."). A State does not disrupt the balance that IRCA struck when it investigates, adjudicates and imposes sanctions that are within IRCA's savings clause.

Moreover, Arizona's law authorizes State sanctions for conduct that is already illegal under federal law, A.R.S. §§ 23-212(A), -212.01(A); 8 U.S.C. §§ 1324a(a), and, as previously explained, the only sanctions that it authorizes are against State licenses. Arizona's law relies on the federal definition of unauthorized alien, A.R.S. § 23-211(11), incorporates defenses for

employers that are included in the federal law, A.R.S. §§ 23-212(I), (J), -212.01(I), (J), includes the federal scienter requirement, A.R.S. § 23-211(7), and requires that State investigators rely on federal information when determining whether a person is an unauthorized alien, A.R.S. §§ 23-212(B), (H), -212.01(B), (H). This law presents no actual conflict with any IRCA requirement.[8]

Arizona's law merely exercises the authority that Congress preserved for States in the savings clause, and it does so in a way that does not conflict with IRCA's requirements. Therefore, it is not preempted.

2. Arizona's Investigations and Adjudications of Claims that an Employer Knowingly or Intentionally Employs Unauthorized Aliens Do Not Conflict With IRCA.

a. As described in the express preemption analysis above, IRCA established procedures for federal investigations and adjudications, 8 U.S.C. § 1324a(e), (f), (g), but did not establish procedures for State adjudications or require completion of a federal adjudication as a prerequisite for a State

[8] In contrast, the local ordinance recently held that the Third Circuit conflicted with IRCA provided no I-9 defense to contractors (*Lozano*, 2010 WL 3504538 at *37) and applied to independent contractors (*id*. at *34). It also authorized sanctions against a business without any prior judicial or administrative proceedings (*id*.).

licensing enforcement action. The previous analysis demonstrates that nothing in IRCA's text or legislative history supports prohibiting a State from investigating and adjudicating claims within the savings clause.

That Congress established procedures for federal investigations and adjudications in IRCA does not indicate any intent to oust State authority to investigate and adjudicate claims within the savings clause. This Court has long recognized that "[t]he mere existence of a federal regulatory or enforcement scheme, even one [that is] detailed does not by itself imply pre-emption of state remedies." *English*, 496 U.S. at 87; *see also N.Y. State Dep't of Social Servs. v. Dublino,* 413 U.S. 405, 415 (1973) (preemption cannot "be inferred merely from the comprehensive character" of the federal law). IRCA is silent on the subject of State procedures, and "matters left unaddressed [in a federal regulatory scheme] are presumably subject to state law." *O'Melveny & Myers v. FDIC,* 512 U.S. 79, 85 (1994). Arizona's investigations and adjudications merely implement the State sanctions that Congress authorized in its savings clause. When Congress explicitly preserves a State remedy, it follows that a federal enforcement scheme does not impliedly preempt the predicate investigations and adjudications.

Permitting State investigations and adjudications to impose sanctions against employers for infractions that are within IRCA's savings clause is consistent with principles that typically govern State

authority. *See Bates,* 544 U.S. at 442 (recognizing State authority to determine whether federal requirements are violated and to make a violation of federal law a State offense). State courts as well as federal courts are "entrusted with providing a forum for the vindication of federal rights," *Haywood v. Brown,* 129 S. Ct. 2108, 2114 (2009), and State courts typically have the authority to resolve questions involving State or federal law, *see, e.g., Tafflin v. Levitt,* 493 U.S. 455, 458 (1990) (concluding that State courts have jurisdiction over federal RICO claims). Petitioners cite no authority supporting a finding that State investigations and enforcements conflict with federal law when Congress has specifically preserved a State remedy.

b. The specific procedures used in Arizona's investigations and adjudications also do not conflict with federal law. Although no federal law requires that it do so, Arizona requires that its State investigations rely exclusively on information from federal authorities regarding an employee's work authorization. A.R.S. §§ 23-212(B), -212.01(B). The State must request information from the federal authorities through 8 U.S.C. § 1373(c), which requires federal authorities to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual . . . for any purpose authorized by law, by providing the requested verification of status information." In addition to this information concerning work authorization, local authorities need evidence

that the employer "knowingly" or "intentionally" employed the unauthorized alien before they can file an action to seek sanctions against a State license. A.R.S. § 23-212(A), -212.01(A); Ariz. R. Civ. P. 65.2(B) (requiring that complaints in sanctions actions include the "facts alleged to show that the employer intentionally or knowingly employed unauthorized aliens").

Petitioners criticize Arizona's law for providing that the information from the federal government regarding an employee's work authorization creates only "a rebuttable presumption of the employee's lawful status." Pet. Br. 40; A.R.S. § 23-212(H). This rebuttable presumption ensures that the employer has an opportunity to rebut the evidence presented to establish a worker's unlawful status. The county attorney must rely on the information from the federal government regarding an employee's work authorization in presenting its case, A.R.S. §§ 23-212(B), (H), -212.01(B), (H), but the employer necessarily has an opportunity to rebut the evidence presented. Nothing in IRCA precludes a State from giving an employer the opportunity to rebut the evidence presented concerning the work authorization, and this procedure ensures that the employer has the opportunity to present any defenses to the court before sanctions are imposed.[9] This rebuttable

[9] Ironically, in the proceedings below, Respondents argued that Arizona's statutory scheme violated employers' due process rights because it precluded them from rebutting the immigration

(Continued on following page)

presumption therefore does not conflict with federal law.[10]

Arizona's law also incorporates the federal law's affirmative defense for employers that in good faith comply with the I-9 process and the favorable presumption for using E-Verify. A.R.S. §§ 23-212(H), (I), -212.01(H), (I); 8 U.S.C. § 1324a(a)(3); IIRIRA, § 404(h)(1). Yet Petitioners allege that including these defenses conflicts with federal laws limiting the use of the I-9 forms and E-Verify information. Pet. Br. 42 (citing 8 U.S.C. §§ 1324a(b)(5), 1324a(b)(4), 1324a(d)(2)(F); IIRIRA, § 404(h)(1)); *see also* U.S. Amicus Br. 24.

These provisions in federal law do not prevent an employer from using the I-9 forms or E-Verify information to establish defenses in a State enforcement

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status information that federal authorities provide. Pet. App. 23a-24a. The court of appeals and the district court both rejected this argument, accepting Respondents' analysis that State law permitted employers to rebut the information regarding immigration status. *Id.* 25a.

[10] Petitioners question whether the information provided under 8 U.S.C. § 1373(c) will, in all circumstances, establish whether an employee is an unauthorized alien. As a practical matter, if the information from the federal authorities does not establish that a person is an unauthorized alien, it means that the county attorney cannot satisfy his burden of proof in an enforcement action. Nevertheless, speculation about how the law might work in a particular case is not a basis for preemption. *English,* 496 U.S. at 90 (stating that allegations concerning possible future occurrences were "too speculative a basis on which to rest a finding of preemption").

action against the employer's license. Section 1324a(b)(4) limits an employer's authority to copy the information it receives through the I-9 process, for purposes other than "complying with the requirements of this subsection." Paragraph (5) restricts the use of the I-9 form "for purposes other than *enforcement* of this chapter [IRCA]" and specified criminal laws. The reference to enforcement indicates that paragraph (5) limits the government's use of the form, not the employer's. Because IRCA's savings clause authorizes State action to impose licensing sanctions against employers, an employer should be able to use the forms to establish an affirmative defense of good faith compliance with the I-9 process in a sanctions proceeding in State court.

For the same reasons, IIRIRA, § 404(h)(1) does not prohibit an employer from using E-Verify information as a defense in a State enforcement action against a State license. Subsection (h)(1) prohibits "any department, bureau, or other agency of the United States government [from] utiliz[ing] [E-Verify information] for any other purpose other than as provided for under a pilot program." This language restricts the government's use of the E-Verify information, but it does not restrict an employer from using E-Verify information in an enforcement action to earn a rebuttable presumption that an employee is authorized to work in this country.

In any case, whether either issue ever arises is speculative. Indeed, the United States argues only that "employers *will likely* need to use the I-9 forms"

to establish an affirmative defense in a sanctions proceeding. U.S. Amicus Br. 25. (Emphasis added). An employer may choose to establish good faith compliance with I-9 processes in another way, such as through testimony of employees and descriptions of office policy. As a practical matter, the E-Verify issue is unlikely to arise because Arizona officials must rely on information from the federal authorities regarding an employee's work authorization in order to bring a sanctions action in the first place. Therefore, if the employer is using E-Verify to confirm the employee's status through the federal databases, most likely no sanctions case would ever be filed.

Arizona's processes for investigation and adjudicating complaints are reasonable measures to implement sanctions that are within IRCA's savings clause. Prohibiting States from investigating and adjudicating complaints that an employer is knowingly or intentionally employing unauthorized aliens would restrict the State's independent exercise of prosecutorial discretion by conditioning a State's ability to take action against a State licensee on a prior federal action, which may never occur. *See Immigration Enforcement at the Workplace: Learning from the Mistakes of 1986: Hearing Before the Subcomm. on Immigr., Border Sec., and Citizenship of the S. Comm. on the Judiciary*, 109th Cong. 13 (2006) (statement of Richard M. Stana, Dir. of Homeland Sec. & Justice, U.S. Gov. Accountability Office) (noting that "worksite enforcement has been a relatively low priority" and DHS focused resources on national security cases).

There is no evidence that Congress attempted to so restrict States' ability to impose sanctions against its licensees. Because Arizona's procedures do not conflict with IRCA, Arizona's law is not preempted.

3. Arizona's Law Does Not Conflict with Federal Law by Disrupting the Balance that Congress Struck Regarding Possible Discrimination or the Potential Burdens on Employers.

Arizona's law need not attempt to further all of the interests that Congress considered when enacting IRCA to avoid conflict preemption. *Gade v. Nat'l Solid Wastes Mgm't Ass'n,* 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (noting that conflict preemption analysis should not be "[a] free wheeling judicial inquiry into whether a state statute is in tension with federal objectives"); *Pension Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 646 (1990) ("[T]here are numerous federal statutes that could be said to embody countless policies."). Arizona's law need only avoid an actual conflict with federal requirements. *English,* 496 U.S. at 90 (stating that the Court does not "seek[ ] out conflicts . . . where none clearly exists") (internal quotation marks omitted).

When Congress enacted IRCA, it included new protections against "discrimination based on national origin or citizenship status." 8 U.S.C. § 1324b. Arizona's law does not undermine the existing protections

against discrimination in State and federal law in any way. *See, e.g.,* 8 U.S.C. § 1324b (prohibiting discrimination based on national origin or citizenship status); 42 U.S.C. § 2000e-2 (prohibiting employment discrimination based on "race, color, religion, sex, or national origin"); A.R.S. § 41-1463(B) (prohibiting employment discrimination based on "race, color, religion, sex, age, disability or national origin"). Although Arizona did not include any additional antidiscrimination protections in its law, Congress did not require States to do so in order to exercise their authority to impose sanctions through "licensing and similar laws." 8 U.S.C. § 1324a(h)(2).

Plaintiffs are wrong to assert that Arizona's employer sanctions statute attempts to prevent unlawful immigration without any concern about potential discrimination. Pet. Br. 45. Although it did not add any new civil rights remedies, Arizona's Legislature explicitly required that the Act "shall not be construed to require an employer to take any action that the employer believes in good faith would violate federal or state law." A.R.S. § 23-213. And it prohibited the State from investigating complaints based solely on a person's "race, color or national origin." A.R.S. §§ 23-212(B); -212.01(B). To deter potential abuses, "false and frivolous complaints" are subject to criminal penalties. *Id.*

It is also wrong to suggest that Arizona's law disregards IRCA's balance with regard to employers. The penalties for false reports protect employers. The judicial proceeding before any sanctions are imposed

protects employers. Arizona also attempts to prevent violations by requiring employers to use E-Verify. In addition, the Legislature severely restricted the investigative authority of local officials by giving them no subpoena power or other authority to require witnesses to provide documents or testimony in employer sanctions investigations. *Compare* A.R.S. § 23-212(A), (B), (C) *with* A.R.S. §§ 38-431.06 (authorizing Attorney General to obtain documents and examine witnesses as part of open meeting law investigations); 41-1403 (similar provisions regarding civil rights investigations); 44-1406 (similar authority regarding anti-trust investigations); 44-1524 (similar authority regarding consumer fraud investigations). Although the threat of a sanction against a State license is a serious matter, IRCA preserved State authority to impose such sanctions against a business. The possibility of those sanctions is part of the balance that IRCA struck.

Nor does Arizona's law undermine IRCA's mandate for "vigorous[] and uniform[]" enforcement. IRCA § 115. The risk of sanctions against licenses in multiple jurisdictions is part of the balance that IRCA struck by preserving State authority to impose sanctions against State licenses.

Permitting States to take actions against licensees who are knowingly employing unauthorized aliens supports the Congressional interest in "vigorous[] . . . enforcement" and respects the savings clause for State enforcement against State licensees. IRCA § 115. In contrast, prohibiting the States from

taking any action against the license of an employer unless and until the federal government has completed its own enforcement action against that employer undermines both the savings clause and Congress's interest in vigorous enforcement.

Moreover, State authority is not limited in this context merely because the issues relate to immigration. Ordinary preemption doctrine applies to matters that touch on immigration. *DeCanas,* 424 U.S. at 360. *DeCanas* recognized the State's strong interest in avoiding the harms to wages and working conditions that may result from the presence of unauthorized workers. Although social scientists may debate the impact of unlawful immigration, in its order denying an injunction pending appeal, the district court found that Arizona's unauthorized alien population adversely impacts wages in Arizona. Add19.

It is also not unusual for State officials to address issues concerning immigration status. For example, federal law mandates that State and local officials administering certain public benefits make eligibility determinations based on the applicant's citizenship or immigration status. *E.g.,* 8 U.S.C. §§ 1611, 1621. Arizona considers immigration status when issuing driver's licenses. A.R.S. § 28-3153(D) (requiring "proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law"). Under Arizona law, immigration status is relevant to bail determinations. Ariz. Const. art. II, § 22 (stating that bail not available for serious felonies "if the person charged has entered or remained

in the United States illegally").[11] And the issue of a person's immigration status may arise in a number of State proceedings, including, for example, wrongful termination cases, *e.g., Incalza v. Fendi N. Am., Inc.,* 479 F.3d 1005, 1008 (9th Cir. 2007) (originally filed in State court but removed to federal court), worker's compensation benefits, *e.g., Felix v. State ex rel. Wyo. Workers' Safety & Comp. Div.,* 986 P.2d 161, 163 (Wyo. 1999), and child welfare cases, *e.g., Jesus M. v. Ariz. Dep't of Econ. Sec.,* 53 P.3d 203, 207 (Ariz. App. 2002). There are many more examples.

The significant local interests relevant here distinguish this case from those that more directly concern foreign affairs. For example, both *Crosby v. National Foreign Trade Council*, 53 U.S. 363 (2000) and *American Insurance Ass'n v. Garamendi,* 539 U.S. 396 (2003), addressed foreign affairs issues that involved weaker State interests than those that are at stake here. *Garamendi,* 539 U.S. at 425 (noting weak State interest in requiring disclosure of Holocaust-era insurance policies); *Crosby,* 53 U.S. at 379-80 (noting that State law concerning sanctions against Burma undermined President's ability to speak for the Nation with one voice on the issue). And, unlike the State alien registration law at issue in *Hines v. Davidowitz,* 312 U.S. 52, 64-66 (1941), this legislation imposes no unique burdens on noncitizens,

[11] The Arizona Court of Appeals upheld the constitutionality of this provision in *Hernandez v. Lynch,* 167 P.3d 1264, 1275 (Ariz. App. 2007).

but rather focuses on the responsibilities of employers within the State.

At bottom, Petitioners' conflict preemption argument asks the Court to use the implied conflict preemption theory to rewrite IRCA's savings clause. The Court should decline to do so. It is up to Congress to determine whether to modify IRCA's savings clause. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 223 (1983) ("[g]iven this statutory scheme, it is for Congress to rethink the division of regulatory authority" between the States and the federal government).

Congress itself explicitly declined to preempt all State authority to impose sanctions against employers who knowingly employ unauthorized aliens. Instead, it expressly preserved State authority to impose sanctions through licensing and similar laws. 8 U.S.C. § 1324a(h)(2). Arizona's law merely exercises the authority Congress preserved in IRCA's savings clause. It does not conflict with IRCA, and it therefore is not preempted.

II. FEDERAL LAW DOES NOT PREEMPT ARIZONA'S E-VERIFY REQUIREMENT.

Arizona's requirement that employers within its jurisdiction use the federal E-Verify program is also not impliedly preempted. Although federal law does not require all employers throughout the country to use E-Verify, Arizona's E-Verify requirement does not make it impossible to comply with federal law or

create an obstacle to accomplishing federal goals. *See Cal. Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572, 581 (1987) (stating principles governing conflict-preemption analysis); *see also Spreitsma,* 537 U.S. at 65-70 (finding no preemption of State tort liability for failure to install propeller guard even though federal regulations did not require propeller guards).

An employer sanctions regime "cannot be effective without a reliable and easy-to-use method for employers to verify work authorization." S. Rep. No. 104-249, at 4 (1996). IRCA's verification system, which relied on the presentation of work authorization documents, was susceptible to widespread document fraud. *Id.* Congress authorized E-Verify, first as a limited pilot and later as a nationwide program, to develop a more effective system for verifying that new employees were authorized workers.

Congress has specifically prohibited the Secretary of Homeland Security from mandating the E-Verify program nationally, IIRIRA, § 402(a), but has not spoken to whether other federal entities, or States, may mandate use of E-Verify. This Court should not read such a prohibition into the statute.

First, it is beyond dispute that it is not "impossible for a private party to comply with both state and federal requirements." *Sprietsma*, 537 U.S. at 64 (citing *English v. General Elec. Co.*, 496 U.S. 79). Arizona employers will not violate the requirements of federal law if they comply with the State's E-Verify requirement. Thus, there is "no inevitable collision" between the requirements of the IIRIRA and the

verification statute. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (upholding State regulation of avocado maturity that was different from federal regulation).

Second, Arizona's requirement does not pose an obstacle to federal goals. The federal government's goal in developing and supporting E-Verify was not to establish a voluntary employee verification system, but to develop an effective one. *Cf.* IIRIRA, § 404(d) (establishing that the goals of the pilot programs were (1) to ensure reliability and ease of use for employers while protecting the privacy and security of the underlying information; (2) to respond to all inquiries from participating employers; (3) to prevent unauthorized disclosure of personal information; and (4) to ensure that the verification system did not cause unlawful discrimination practices). Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, Title V, § 547, 123 Stat. 2142 (2009) (Appropriations bill noting that the E-Verify program was meant "to assist U.S. employers with maintaining a legal workforce").

A State E-Verify requirement helps advance the federal goals of having an effective verification system and a lawful workforce. A 2007 study of E-Verify indicated that one of the barriers to E-Verify's effectiveness had been a lack of employer participation, which "plac[ed] limitations on its effectiveness of preventing unauthorized employment on a national basis." 2007 Westat Report at xxii. Arizona's requirement facilitates expanding the program's use. From

April through June 2005, employers submitted only 217,000 cases to E-Verify. 2009 Westat Report at xxxii. In the period of April through June 2008, this amount had grown eightfold to 1.7 million cases. *Id*. Westat characterizes this rapid expansion as a strength of the E-Verify program. *Id.* Although it does not account for all of E-Verify's expansion, Arizona's E-Verify requirement clearly supports the program by creating an influx of new participants.

Contrary to Petitioners' argument,[12] nothing in the record suggests that Arizona's requirement or similar requirements by other States overburden the E-Verify program. As the United States acknowledges, "DHS advises in this case that the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create." U.S. Amicus Br. 34. This is consistent with congressional testimony of USCIS officials that Arizona's law did not siphon organizational resources away from the agency's E-Verify mission when it became effective. *Department of Homeland Security Appropriations for 2009*, *Hearing Before the H. Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 110th Cong. 300 (2008) (statement of USCIS Director Emilio Gonzalez). In fact, the USCIS concluded as early as 2008 that the E-Verify program could handle the

[12] Petitioners wrongly assert that if all fifty States required E-Verify, it would "overwhelm the federal system." Pet. Br. 50-51. Neither the record in this facial challenge nor the United States' brief in this case supports that statement.

verification workload if the program were mandatory for all U.S. employers. *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse, Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. of the Judiciary*, 110th Cong. 52 (2008) (statement of Acting USCIS Director Jonathan Scharfen).

The United States' actions, prior to briefing before this Court, were consistent with this understanding and supported E-verify. When then-Arizona Governor Napolitano signed the Act in July 2007, she advised federal officials of Arizona's new requirement, JA 402, but heard no objection in response. In contrast, when Illinois attempted to ban the use of E-Verify in that jurisdiction, the United States promptly brought suit to enjoin Illinois' law. *United States v. Illinois,* No. 07-3261, 2009 WL 662703 (C.D. Ill. March 12, 2009).

Moreover, the United States pointed favorably to Arizona's law when it successfully defended the Executive Order and regulation requiring federal contractors to participate in the E-Verify program. In *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009), the United States successfully defended the Executive Order and subsequent regulation requiring federal contractors to participate in the E-Verify program. In that case, the United States disputed the notion that no one could require employers to participate in E-Verify as "patently and demonstrably false." Defs.' Reply Mem. in Supp. of Mot. for

Summ. J. at 7. According to the United States' brief in that case, IIRIRA, § 402(a) enjoined only the Secretary of Homeland Security – and no one else – from requiring participation. *Id.* The United States cited Arizona's law in support of that proposition and conceded that it was "permissible because the state of Arizona is not the Secretary of Homeland Security." *Id.* (citing *Chicanos Por La Causa*, 558 F.3d at 867). In conclusion, the United States argued that Congress "allows states to mandate [E-Verify's] use by public and private employers within their jurisdiction." *Id.* at 21-22.[13]

The United States now attempts to distinguish the federal government's requirement that its contractors use E-Verify based on the voluntary nature of the contractual relationship. U.S. Amicus Br. 29 n.10. Under Arizona law, however, the consequences of not using E-Verify are similar to the consequences under federal law. Arizona imposes no direct penalty against employers who do not comply with the mandate in A.R.S. § 23-214(A) that they "shall" use E-Verify. Under Arizona law, an employer that does not use E-Verify will not receive a rebuttable presumption in a sanctions action and is not eligible for economic

[13] The United States attempts to harmonize its position in this case with its arguments supporting an E-Verify requirement for federal contractors in *Chamber of Commerce v. Napolitano.* U.S. Amicus Br. 29, n.10. Their current position suggests that even if States cannot require all employers to use E-Verify, they can still require State contractors and State grant recipients to use E-Verify since those requirements are voluntary in nature.

development incentives from government entities. A.R.S. § 23-212(I); A.R.S. § 23-214(B). The employer would also not be listed on the Arizona Attorney General's website as an Arizona business that uses E-Verify. A.R.S. § 23-214(C).[14] This type of E-Verify requirement poses no more of an obstacle to Congress's goals than the federal government's E-Verify requirement for its contractors. Both further Congress's goals of improving the employee verification system and ensuring that employers hire people authorized to work in this country.

Petitioners and the United States place significant weight on *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) but that decision is readily distinguishable. In *Geier,* the Court determined that imposing liability on car manufacturers for failing to install airbags conflicted with the federal law that gave manufacturers the option of selecting among different safety systems. *Id*. at 886. The Court was persuaded that mandating airbags through State tort law directly undermined the agency's policy of giving "more time for manufacturers to develop airbags or other, better, safer passive restraint systems." *Id.* at 879.

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[14] Petitioners filed their lawsuit in this case when the only consequence of not using E-Verify specified in statute was losing the benefit of a rebuttable presumption in a sanctions action. The Legislature added the other consequences in 2008. 2008 Ariz. Sess. Laws ch. 152.

Unlike the State law at issue in *Geier*, a State E-Verify requirement does not undermine the development of other verification systems. As described above, Congress experimented with three pilot programs beginning in 1996, but E-Verify is now the only one that remains. In *Geier,* the private marketplace was responsible for market innovations, and the federal agency responsible for highway safety did not want to thwart innovation by imposing a particular system. *Id.* at 879. Here, the federal government, not the private marketplace, develops the verification system. And requiring Arizona employers to participate in the E-Verify program advances Congress' interest in improving that employee verification system.

Petitioners' and the United States' reliance on *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), is equally misplaced. In *Buckman,* the Court rejected a State-tort claim alleging "fraud on the Food and Drug Administration." Noting that federal law gave the FDA the responsibility to police fraud and that State tort regimes might create incentives to provide unnecessary information to the FDA and might deter applications for FDA approval of medical devices because of liability concerns, the Court determined that tort liability conflicted with the federal scheme. *Id.* at 349-51. A State E-Verify requirement creates none of those problems.

Petitioners rely on *Buckman* for the principle that the "relationship between a federal agency and

the entity it regulates is inherently federal in nature." Pet. Br. 50. Arizona requires employers to participate in the program, but does not interfere with the relationship between the business and those administering E-Verify. That was not the case in *Buckman.* In that case, indirectly imposing additional disclosure requirements on applicants to the FDA would interfere with the federal agency's procedures and ability to process applications for new medical devices. *Buckman,* 531 U.S. at 350-51.

Similarly, relying on *Buckman,* the United States argues broadly for the principle that "absent a clearer indication than is present here, federal statutes of this kind should not be understood to allow States to impose such burdens on federal programs." United States Br. 34. But the United States also concedes that Arizona's requirement does not burden the Department of Homeland Security. *Id.* And federal authorities have no cap on participation and no control over the volume of participation nationally. Moreover, the broad principle that the United States asserts contradicts conflict-preemption principles, which look for clear evidence that Congress intended to oust State authority, rather than for evidence that Congress intended to preserve State authority. *Medtronic,* 518 U.S. at 485.

The conflict-preemption analysis asks whether this law makes it impossible to comply with federal law or creates obstacles to achieving federal objectives. Arizona's law does not impede compliance with federal law and in fact helps to advance the federal

government's interest in ensuring a lawful workforce and developing an effective employee verification program. Therefore, Arizona's E-Verify requirement does not conflict with federal law and is not preempted.

CONCLUSION

For these reasons, this Court should affirm the court of appeals decision.

Respectfully submitted,

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ADDENDUM A

8 U.S.C. § 1373. Communication between Government agencies and the Immigration and Naturalization Service

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship 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.

ADDENDUM B

Arizona Rules of Civil Procedure, Rule 65.2. Action pursuant to A.R.S. § 23-212 or § 23-212.01

(a) Commencement of Action. An action brought by the county attorney pursuant to A.R.S. § 23-212 or § 23-212.01 shall be commenced by filing a verified complaint with the clerk of the superior court. The attorney signing the complaint shall verify that the attorney believes the assertions in the complaint to be true on the basis of a reasonably diligent inquiry.

(b) Contents of Complaint. A complaint filed under this Rule shall include the following:

(1) The name and address(es) of the employer;

(2) Specification of one or more business licenses subject to suspension or revocation under A.R.S. § 23-212 or § 23-212.01 that are held by the employer, and the identity and address of the licensing agency(ies), including the identity(ies) and mailing address(es) of the agency official(s) authorized to accept service under this Rule;

(3) A statement of specific facts alleged to show that one or more employees are unauthorized aliens;

(4) A statement of specific facts alleged to show that the employer intentionally or knowingly employed one or more unauthorized aliens; and

(5) In the case of an action for a second violation of A.R.S. § 23-212 or § 23-212.01, the case number of the first action and the date of the order or judgment

finding a first violation of A.R.S. § 23-212 or § 23-212.01. The complaint shall also include as an attachment a copy of the court's order or judgment finding a first violation of A.R.S. § 23-212 or § 23-212.01.

(c) Nature of Proceedings. An action brought pursuant to A.R.S. § 23-212 or § 23-212.01 shall be denominated as a civil action and assigned a specific subcategory code for purposes of case tracking. An action brought pursuant to A.R.S. § 23-212 or § 23-212.01 shall be heard and decided by the court sitting without a jury, except as otherwise permitted by Rule 39(m).

(d) Venue. An action brought pursuant to A.R.S. § 23-212 or § 23-212.01 shall be brought against the employer by the county attorney in the county where the unauthorized alien employee is or was employed by the employer. If the employee is or was employed by the employer in more than one county, the action shall be proper in any county in which the employee is or was employed by the employer.

(e) Expedited Proceedings. The court shall expedite an action brought pursuant to A.R.S. § 23-212 or § 23-212.01.

(f) Scheduling Conference. Simultaneously with the filing of the complaint required by subsection (a) of this Rule, the county attorney shall file an application and submit a form of order requesting the court to set a date for a scheduling conference to determine the schedule for expedited proceedings. A copy of the signed order shall be served on the employer and may

be served with the complaint. At the scheduling conference, the court may address the matters set forth in Rule 16(b) and may set such additional hearings as it deems necessary. On or before the date of the scheduling conference, the employer shall file and serve a written disclosure of the identity of all business licenses that it holds in this State.

(g) Evidentiary Hearing; Summary Judgment. The court may not order a license suspension or license revocation pursuant to A.R.S. § 23-212 or § 23-212.01 without first affording the parties the opportunity for an evidentiary hearing, unless all parties waive the hearing. Rule 56 shall not apply to these proceedings except upon the agreement of all parties.

(h) Standard of Proof. All factual issues required to be determined by the court shall be determined by a preponderance of the evidence.

(i) Applicability of Rules of Evidence. Except as provided in A.R.S. § 23-212(H) or § 23-212.01(H), the Arizona Rules of Evidence shall apply to proceedings under this Rule.

(j) Enforcement of Court Orders.

(1) After the entry of an order under A.R.S. § 23-212(F)(1) or § 23-212.01(F)(1) for a first violation, if an employer fails to file a timely sworn affidavit required by A.R.S. § 23-212(F)(1)(c) or § 23-212.01(F)(1)(d), the county attorney shall file an application for an order to show cause why the employer's licenses with the appropriate licensing agencies should not be

suspended beyond any period prescribed in any prior court order. The application shall be accompanied by an affidavit or other proof demonstrating that the employer has failed to file the required sworn affidavit and shall set forth the identity and address of any appropriate licensing agency, including the identity and mailing address of the agency official authorized to accept service under this Rule.

(2) Within five (5) days after service of an application for an order to show cause, the employer may file an opposition to the relief sought in the application and to any further license suspension on the ground that the employer has filed an affidavit meeting the requirements of A.R.S. § 23-212(F)(1)(c) or § 23-212.01(F)(1)(d). If such an opposition is timely filed, the court shall hold a hearing and shall not order any further license suspension until it renders its decision on whether to grant the relief sought in the application. If no opposition is timely filed or if the court grants the relief sought in the application, the court shall order the appropriate licensing agencies to suspend indefinitely all applicable licenses held by the employer.

(3) After the entry of an order suspending a license for a first violation for failure to file a required sworn affidavit, the employer may, by motion or stipulation, seek relief from the order on the ground that the employer has filed a sworn affidavit required by A.R.S § 23-212(F)(1)(c) or § 23-212.01(F)(1)(d). If such a showing is made and subject to the completion of any term of license suspension ordered under

A.R.S. § 23-212(F)(1)(d) or § 23-212.01(F)(1)(c), the court shall enter an order terminating any further license suspension.

(4) The clerk of the superior court shall distribute by any method authorized by Rule 58(e) a certified copy of any order suspending or revoking a license, or terminating a license suspension, entered under this Rule, or under A.R.S. § 23-212 or § 23-212.01, to the parties, the Arizona Attorney General, and any licensing agency ordered to suspend an employer's license.

(k) Action for Second Violation. An action alleging a second violation under A.R.S. § 23-212(F)(2) or § 23-212.01(F)(2) shall be filed and served as a new action.

(l) Requirement of Electronic or Facsimile Service. After a party has appeared in a proceeding brought under this Rule, any papers served on that party by mail under Rule 5(c) shall also be served at the same time by electronic mail or by facsimile, or as agreed to by the parties or ordered by the court. If the party on whom service is to be made does not have access to electronic mail or facsimile, then service shall be made as otherwise provided by Rule 5(c).

(m) Fees**.** The court shall assess such fees in these proceedings as may be prescribed by A.R.S. §§ 12-284, 12-284.01, and 12-284.02.

ADDENDUM C

UNITED STATES DISTRICT COURT,
D. ARIZONA

Nos. CV07-02496-PHX-NVW,
CV07-02518-PHX-NVW.

ARIZONA CONTRACTORS ASSOCIATION, INC., AN ARIZONA NONPROFIT CORPORATION; ARIZONA EMPLOYERS FOR IMMIGRATION REFORM, INC., AN ARIZONA NON-PROFIT CORPORATION; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, A WASHINGTON D.C. NON-PROFIT CORPORATION; ARIZONA CHAMBER OF COMMERCE, AN ARIZONA NON-PROFIT CORPORATION; ARIZONA HISPANIC CHAMBER OF COMMERCE, INC., AN ARIZONA NONPROFIT CORPORATION; ARIZONA FARM BUREAU FEDERATION, AN ARIZONA NON-PROFIT CORPORATION; ARIZONA RESTAURANT AND HOSPITALITY ASSOCIATION, AN ARIZONA NON-PROFIT CORPORATION; ASSOCIATED MINORITY CONTRACTORS OF AMERICA, AN ARIZONA NON-PROFIT LIMITED LIABILITY COMPANY; ARIZONA ROOFING CONTRACTORS ASSOCIATION, AN ARIZONA NON-PROFIT CORPORATION; NATIONAL ROOFING CONTRACTORS' ASSOCIATION, AN ILLINOIS NOT-FOR-PROFIT CORPORATION; WAKE UP ARIZONA! INC., AN ARIZONA NON-PROFIT CORPORATION; AND ARIZONA LANDSCAPE CONTRACTORS ASSOCIATION, INC., AN ARIZONA NON-PROFIT CORPORATION,

Plaintiffs,

v.

CRISS CANDELARIA, APACHE COUNTY ATTORNEY; ED RHEINHEIMER, COCHISE COUNTY ATTORNEY; TERENCE C. HANER, COCONINO COUNTY ATTORNEY; DAISY FLORES, GILA COUNTY ATTORNEY; KENNY ANGLE, GRAHAM COUNTY ATTORNEY; DEREK D. RAPIER, GREENLEE COUNTY ATTORNEY; MARTIN BRANNAN, LAPAZ COUNTY ATTORNEY; ANDREW P. THOMAS, MARICOPA COUNTY ATTORNEY; MATTHEW J. SMITH, MOHAVE COUNTY ATTORNEY; JAMES CURRIER, NAVAJO COUNTY ATTORNEY; BARBARA LAWALL, PIMA COUNTY ATTORNEY; JAMES P. WALSH, PINAL COUNTY ATTORNEY; GEORGE SILVA, SANTA CRUZ COUNTY ATTORNEY; SHEILA POLK, YAVAPAI COUNTY ATTORNEY; JON SMITH, YUMA COUNTY ATTORNEY; TERRY GODDARD, ATTORNEY GENERAL OF THE STATE OF ARIZONA; AND FIDELIS V. GARCIA, DIRECTOR OF THE ARIZONA REGISTRAR OF CONTRACTORS,

Defendants.

VALLE DEL SOL, INC.; CHICANOS POR LA CAUSA, INC.; AND SOMOS AMERICA,

Plaintiffs,

v.

TERRY GODDARD, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF ARIZONA; GALE GARRIOTT, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE; AND ANDREW THOMAS, IN HIS OFFICIAL CAPACITY AS MARICOPA COUNTY ATTORNEY,

Defendants.

Feb. 19, 2008.

ORDER

NEIL V. WAKE, District Judge.

Plaintiffs have appealed the February 7, 2008 judgment dismissing Defendant Arizona Attorney General Terry Goddard without prejudice for lack of subject matter jurisdiction and entering judgment in favor of all other Defendants. They now seek an injunction preventing Defendants from implementing or enforcing the Legal Arizona Workers Act ("the Act"), A.R.S. §§ 23-211 through 214, for the duration of the appeal. Fed.R.Civ.P. 62(c). (Doc. 181, 182, and 183.) The court's findings of fact and conclusions of law (Doc. # 175) principally concluded: (1) that the Act is not expressly preempted by the Immigration Reform and Control Act of 1986 ("IRCA"), Pub.L. No. 99-603, 100 Stat. 3359 (employer sanctions provisions codified at 8 U.S.C. § 1324a to 1324c (2000)); (2) that the structure and purpose of IRCA do not clearly indicate Congressional intent to occupy the field of licensing sanctions for employers of unauthorized aliens; (3) that the Act does not regulate immigration; (4) that neither the licensing sanctions provisions of A.R.S. § 23-212, nor the requirement to use E-Verify found in A.R.S. § 23-214 conflicts with the purposes and objectives of Congress; (5) that the Act affords employers due process of law; and (6) that the Act

does not violate the Commerce Clause of the U.S. Constitution.

I. Standards for Injunction Pending an Appeal

An injunction pending appeal under Federal Rule of Civil Procedure 62(c) is an extraordinary remedy that should be granted sparingly. *Reading & Bates Petroleum Co. v. Musslewhite,* 14 F.3d 271, 275 (5th Cir.1994) ("Stays pending appeal constitute extraordinary relief."); *United States v. Texas,* 523 F.Supp. 703, 729 (E.D.Tex.1981) ("Since such an action interrupts the ordinary process of judicial review and postpones relief for the prevailing party at trial, the stay of an equitable order is an extraordinary device which should be sparingly granted.").

Four factors must be considered on Rule 62(c) motions: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).

In general, to prevail on a motion for injunction pending appeal, the moving party must show either (1) "a strong likelihood of success on the merits" and "the possibility of irreparable injury to plaintiff if preliminary relief is not granted" or (2) "that serious legal questions are raised and that the balance of

hardships tips sharply in its favor." *Golden Gate Restaurant Ass'n. v. City of San Francisco,* No. 07-17370, ___ F.3d ___, 2008 WL 90078, at *2, 2008 U.S.App. LEXIS 364, at *4 (9th Cir. Jan.9, 2008) (quoting *Natural Res. Def. Council, Inc. v. Winter,* 502 F.3d 859, 862 (9th Cir.2007); *Lopez v. Heckler,* 713 F.2d 1432, 1435 (9th Cir.1983)). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Winter,* 502 F.3d at 862. Courts must "consider 'where the public interest lies' separately from and in addition to" the balance of hardships between the parties. *Id.* at 863.

All laws passed by State legislatures are entitled to a presumption of validity. That presumption is an equity to be considered in favor of the State when balancing hardships. *See Walters v. Nat'l Ass'n of Radiation Survivors,* 468 U.S. 1323, 1324, 105 S.Ct. 11, 82 L.Ed.2d 908 (1984) (Rehnquist, J., chambers). For that reason, in cases "in which 'the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme,' the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard." *Bery v. City of New York,* 97 F.3d 689, 694 (2d Cir.1996) (citing *Plaza Health Labs., Inc. v. Perales,* 878 F.2d 577, 580 (2d Cir.1989)); *Tunick v. Safir,* 209 F.3d 67, 70 (2d Cir.2000). *Cf. Golden Gate Restaurant Ass'n.,* 2008 WL 90078, at *13, 2008 U.S.App. LEXIS 364, at *37 (stating that to overcome

the public interest factor, it must be "obvious" that the law is invalid).

In this case an injunction is not needed to protect appellate jurisdiction and would upset the status quo.

II. Plaintiffs are Unlikely to Succeed in Invalidating the Act

Plaintiffs bear a heavy burden to invalidate the Act on appeal. They challenge the Act on its face, so they must prove that the Act cannot operate validly under any circumstance. To show that the federal government has occupied the field of licensing sanctions laws, Plaintiffs will have to overcome IRCA's preservation of state authority for employer sanctions by "licensing and similar laws." 8 U.S.C. § 1324a(h)(2).

Congress has extensive authority to destroy residual state police powers – to close the fifty laboratories of experiment. The protection of our federalism lies in Congress having to do so clearly and having to answer for it. "[T]he structural safeguards inherent in the normal legislative process operate to defend state interests from undue infringement." *Geier v. American Honda Motor Co.,* 529 U.S. 861, 907, 120 S.Ct. 1913, 146 L.Ed.2d 914 (Stevens, J., dissenting). But no one answers for it when, from special knowledge of purposes and proportionalities, the courts attribute preemption to Congress free of its own words that are plain enough to citizens. This would disarrange our federalism. It would require a bicameral majority to

restore state power, rather than leaving state power as our constitutional default position in the absence of a federal bicameral majority. Plaintiffs are unlikely to succeed in reading the express preservation of state licensing sanctions out of IRCA.

Plaintiffs' conflict preemption, due process, and dormant Commerce Clause arguments are even weaker. To some extent they attack the edges of the Arizona Act, not its core, on hypothetical facts not shown in this case. To that extent their attacks are directed at particular applications of the Act and are beyond this facial challenge. Further, if any single provision fails, the Act's severability clause will save the remainder, provided that the Act is not entirely preempted.

Plaintiffs do not have a probability of success on appeal, much less a strong probability. A mere "serious question" is not enough to suspend state action "taken in the public interest pursuant to a statutory . . . scheme." *Bery v. City of New York,* 97 F.3d at 694. This shortfall alone requires denial of the motions for injunction pending appeal.

III. The Balance of Hardships Favors Defendants

A. Plaintiffs' Hardship is Minimal

Plaintiffs' hardship comes down to nothing more than the expense of using E-Verify. If the federal government's statistics hold true for Arizona employers, 85% will spend less than $100 to set-up

E-Verify and 75% will spend less than $100 annually to operate the system. The average employer will likely spend $125 in set-up and $728 in maintenance of the system. (Joint Statement of Stipulated Facts ("Facts"), Doc. # 152, Ex. 52 at 104.)

The Act's E-Verify requirement is an increment to the already pervasive regulation of labor and employment in our society. A complaint that there is more cost to comply with labor regulation has little purchase. It is difficult to establish irreparable injury based on prospective monetary damages alone. *See Stop H-3 Ass'n v. Volpe,* 353 F.Supp. 14, 18 (D.Haw.1972) *rev'd on other grounds,* 533 F.2d 434 (9th Cir.1976) (citations omitted) ("Traditionally, the irreparable injury contemplated by Rule 62(c) is that which will make the appeal moot. Thus, prospective monetary damage is *not* irreparable injury."). While the cost of using E-Verify meets the minimum for standing, it is not so great as to warrant an injunction. *See Yniguez v. Mofford,* 730 F.Supp. 309, 317 (D.Ariz.1990) *rev'd on other grounds,* 939 F.2d 727 (9th Cir.1991) ("While Yniguez has established a sufficient threat of enforcement to provide an actual controversy for purposes of Article III and the Declaratory Judgment Act, she has not established an enforcement threat sufficient to warrant injunctive relief."); *Lawson v. Hill,* 368 F.3d 955, 959 (7th Cir.2004) ("Even if we are wrong to suppose the risk of prosecution too remote to confer standing to sue . . . the district judge was right not to enter an injunction. . . . [a]n injunction is an extraordinary remedy.").

Moreover, complying with E-Verify will have offsetting business benefits for Plaintiffs. It effectively ensures that they will be virtually immune from licensing sanction proceedings. *Arizona Contractors Ass'n v. Napolitano,* No. CV07-1355-PHX-NVW, ___ F.Supp.2d ___, 2007 WL 4293641, at * 11, 2007 U.S. Dist. LEXIS 90694, at * 34 (D.Ariz. Dec.7, 2007). Based upon past users' experiences, an overwhelming majority of Arizona employers will likely find E-Verify an effective and convenient tool for employment verification, (Facts, Doc. # 152, Ex. 52 at 140), and will rate the program "Excellent," "Very Good," or "Good" (Facts, Doc. # 149, Ex. 13 at 4).

Plaintiffs submit two declarations from Arizona employers who assert that they will have to spend much more than the usual amount to set up E-Verify. (Facts, Doc. # 150, Ex. 26 & 27.) Both are owners of franchise restaurants who allegedly will have to purchase computer equipment and dedicated Internet connections for each location to comply with E-Verify. One employer states that he will need to spend more than 82 times the national average to set up the system. Both declarations state bare conclusions. Neither displays any of the resourcefulness one expects from business people seeking efficient solutions to problems. The failure to explain and exclude other solutions leaves the court unpersuaded that either declaration states a likely true cost. Even if the declarations are taken at face value, their costs are minor compared to the cost to the State, others, and

to the public interest from suspending the Act, as explained below.

B. An Injunction Will Injure the Direct Financial Interests of the State

The State will suffer monetary damages from an injunction pending appeal. Its expenditure to inform every employer by October 1, 2007, of the Act and of the obligation to comply with E-Verify after December 31, 2007, will be wasted. 2007 Ariz. Sess. Laws, Ch. 279, § 3. (Facts, Doc. # 148, Ex. 6.) Giving individuals actual notice of the law, when it begins, and how to avoid risk by complying with E-Verify, was critical to the legislature's purpose of achieving effective deterrence with the fewest number of employers suffering actual sanctions. If the Act is suspended by court order, that legislative purpose of individual fairness will be defeated unless a new notice is sent in the event that the Act is allowed to go back into effect. Therefore, if an injunction were issued, the court would require Plaintiffs to post a bond under Rule 62(c) to cover the cost of a new notice.

IV. The Harm to the Public Interest from an Injunction Against Enforcement of the Act Would Greatly Outweigh Plaintiffs' Cost of Compliance

A. The Arizona Legislature Has Declared the Public Interest

The parties have submitted a number of expert reports and declarations concerning the effect of

immigration on the Arizona economy and wages. Significantly, Plaintiffs' studies do not distinguish between the effect of authorized and unauthorized immigration. Only Defendants' expert, Prof. George Borjas, offers a conservative estimate of the effect of unauthorized alien labor on authorized labor, both alien and citizen. For this and other reasons discussed below, the court finds Defendants' expert to be persuasive.

In any event, this is not an appropriate forum for second guessing the Arizona legislature's decision that the public interest is best served by strongly deterring the knowing or intentional employment of unauthorized aliens. This court's "consideration of the public interest is constrained in this case, for the responsible public officials in [the State] have already considered that interest." *Golden Gate Restaurant Ass'n.,* 2008 WL 90078, at *13, 2008 U.S.App. LEXIS 364, at *37. The Arizona legislature, like the federal government before it, balanced competing social and economic interests and decided in favor of an economy for those authorized to work in the United States. "[If it were obvious that the [Act] was unconstitutional or preempted by a duly enacted federal law[,]" there might be some basis to conclude that the public interest is not served by the Arizona legislature's preferred values. *Id.* However, one cannot by any stretch of reason describe the Act as obviously invalid. It is therefore in the public interest that this court exercise its "discretionary power with proper regard for the rightful independence of state governments in

carrying out their domestic policy." *Id.* (quoting *Burford v. Sun Oil Co.,* 319 U.S. 315, 318, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943)). Declining an injunction pending appeal will allow the Act's continued application, and therefore will "in a real sense, preserve rather than change the status quo." *Id.* at *3, 2008 U.S.App. LEXIS 364, at *7, 2008 WL 90078.

B. By the Most Conservative of Measures, the Balance of Hardships Favors the Defendants and the Public Interest

In addition to noting the illegitimacy of disagreeing with the legislative body's preferred values, the court of appeals in *Golden Gate Restaurant Association* did assess the harm to the public and the beneficiaries of the challenged ordinance. *Id.* at * 13, 2008 U.S.App. LEXIS 364, 2008 WL 90078 at *35-37. Here also, the court is persuaded by Defendants' expert, Prof. George Borjas, that the number of unauthorized workers in Arizona is very substantial and that their presence in the work force drives down wages for competing authorized workers. For high school dropouts alone, wages are depressed by at least 4.7%, or about $950 annually. This exceeds $200 million per year just for those authorized workers. The numbers are far greater when including all authorized workers. (Facts, Doc # 150, Ex. 1 of Ex. 39 at 16.) Again, though these are gross estimates, Prof. Borjas has favored conservative figures.

Plaintiffs' experts are unpersuasive. Professor Marc R. Rosenblum, a political scientist and not an economist, offers general political arguments why employer sanctions have been ineffective and are a bad idea. While his historical narrative is helpful, his conclusions are not empirical science. Rather, they are speculations about the effects of the Arizona employer sanctions law, speculations which the legislature was not bound to accept. His conclusion that "[e]mployer sanctions depress wages for all U.S. workers" is not persuasive, and the court does not believe it. (Facts, Doc. # 150, Ex. 36 at 9.)

The conclusions of Judith K. Gans, also not an economist, about the general benefits of immigration do not address the effects of unauthorized alien labor upon those whom the legislature chose to protect. (Facts, Doc. # 150, Ex. 35.) The opinions of Prof. Giovanni Peri (Facts, Doc. # 150, Ex. 38) also do not persuasively undercut the opinions of Prof. Borjas (Doc. # 159, Borjas Aff.).

These expert reports include, and therefore inappropriately attempt to give weight to, the value of benefits produced by unauthorized alien labor. The benefits in fact to those who come to this country against the law to make better lives for themselves, to those who save from lower cost labor and general depression of wages from employing unauthorized aliens, and to those who enjoy the products of unauthorized labor at lower prices, do not count. The beneficiaries chosen identically by federal and Arizona law prevail over all who benefit from unauthorized

alien labor. They are the authorized workers in the United States who compete with unauthorized aliens. *See Incalza v. Fendi N. Am., Inc.,* 479 F.3d 1005, 1011 (9th Cir.2007) (quoting H.R. Rep. 99-682(I), at 46, *as reprinted in* 1986 U.S.C.C.A.N. at 5650) ("In passing IRCA, Congress wished to stop payments of wages to unauthorized workers, which act as a 'magnet . . . attract[ing] aliens here illegally,' and to prevent those workers from taking jobs that would otherwise go to citizens."). For these reasons, Plaintiffs' experts' conclusions are not helpful or persuasive in balancing the hardships.

The court finds as a fact that the cost of complying with E-Verify for Plaintiffs and all other Arizona employers is far less than the wage depression to the poorest Arizona workers from unauthorized alien labor. This effect on the public interest strongly weighs in favor of allowing the Act's continued implementation. Further, as persuasively detailed by Prof. Borjas, there are other and greater costs to workers from the large number of unauthorized alien workers in Arizona. An injunction would retreat from a status quo in which those with the least are getting a fairer chance at a small share of the prosperity of our Nation.

C. An Injunction Would Forfeit the Deterrence Already Achieved

There is good reason to think that the Act will significantly stem the increase and reduce the

absolute number of unauthorized alien workers in Arizona. It reduces employers' incentive to discriminate against foreign-appearing applicants, as E-Verify use assures that they are safe in retaining or terminating any new hire. Most frauds are easily caught. Unlike IRCA and the I-9 system alone, the Act apparently has a real deterrent effect. Unauthorized alien workers are more likely to cease their perjured claims of authorization if they think their efforts will fail. Employers may now accord the verification process more of the seriousness that Congress originally intended, and even identity theft may decrease as E-Verify includes photo identification.

Though no enforcement has begun yet, anecdotal accounts in the press indicate that pre-enforcement deterrence is occurring; unauthorized aliens are leaving and some wage levels may be increasing. Of course, anecdotes are not proof of systemic success-only the future can show that. But an injunction pending appeal would stop the future before it happens. It would forfeit the momentum of deterrence that the Act already has achieved.

D. The Public Interest Favors Learning the Effect of the Arizona Experiment Before Congress Considers Renewal of E-Verify in November 2008

Another factor in the public interest further disfavors an injunction in this case. Though the Act could survive without E-Verify, that mandatory verification system greatly aids the Act's economy and

effectiveness, and provides easy avoidance of liability. The Act directly serves the interests of Congress, which is to experiment with and refine the employment eligibility verification system. Unless extended, E-Verify's authorization will expire in November, 2008. Basic Pilot Program Extension and Expansion Act of 2003 ("Expansion Act"), Pub.L. No. 108-156, 117 Stat.1944 (note following 8 U.S.C. § 1324a (Supp.IV.2000)). Before then, Congress would benefit from the experience of Arizona employers under the Act.

V. CONCLUSION

Plaintiffs have shown neither a likelihood of success on the merits nor a balance of hardships in their favor. An injunction pending appeal is not warranted.

IT IS THEREFORE ORDERED that the motions for injunction pending appeal (Doc. 181, 182, and 183) are denied.