

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Puente Arizona, et al.,

10 Plaintiffs,

11 v.

12 Joseph M. Arpaio, et al.,

13 Defendants.

No. CV-14-01356-PHX-DGC

ORDER

14 This case involves the constitutionality of two statutes that criminalize the act of
15 identity theft done with the intent to obtain or continue employment. Plaintiffs claim that
16 the purpose of these statutes is to discriminate against unauthorized aliens and that this
17 purpose makes the statutes unconstitutional under the Supremacy and Equal Protection
18 Clauses of the United States Constitution. Plaintiffs have moved for a preliminary
19 injunction that would enjoin Defendants from enforcing portions of these statutes.
20 Doc. 30. Defendants have responded and filed motions to dismiss. Docs. 53, 55. The
21 Court heard oral arguments on October 16, 2014. For reasons set forth below, the Court
22 will grant the motion for a preliminary injunction and deny Defendants' motions to
23 dismiss.

24 **I. Background.**

25 **A. Federal Immigration Law.**

26 The federal government has broad and plenary powers over the subject of
27 immigration and the status of aliens. *Arizona v. United States*, 132 S. Ct. 2492, 2498
28 (2012). This authority rests, in part, on the federal government's constitutional power to

1 establish a uniform rule of naturalization, U.S. Const. art. I, § 8, cl. 4, and its inherent
2 power as a sovereign to control and conduct relations with foreign nations, *Arizona*, 132
3 S. Ct. at 2498. In accordance with these powers, Congress passed the Immigration
4 Reform and Control Act (“IRCA”) in 1986. Pub. L. No. 99-603, 100 Stat. 3359 (1986).
5 IRCA “made combating the employment of illegal aliens in the United States central to
6 ‘[t]he policy of immigration law.’” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S.
7 137, 147 (2002) (quoting *INS v. Nat’l Ctr. For Immigrants’ Rights, Inc.*, 502 U.S. 183,
8 194 & n.8 (1991)).

9 IRCA established a “comprehensive framework” for regulating the employment of
10 unauthorized aliens.¹ *Arizona*, 132 S. Ct. at 2504. It did so by establishing an extensive
11 “employment verification system,” 8 U.S.C. § 1324a(b), to deny employment to
12 unauthorized aliens, *Hoffman*, 535 U.S. at 147. IRCA requires employers to verify the
13 “employment authorization and identity” of new employees before they begin work. 8
14 U.S.C. § 1324a(b). An individual may prove his or her employment authorization by
15 providing a document evidencing United States citizenship or an alien registration card.
16 *Id.* § 1324a(b)(1)(B)-(C). An individual may prove his or her identity by a variety of
17 documents, including a state driver’s license. *Id.* § 1324a(b)(1)(D). All of these
18 requirements are now formalized in the Form I-9 that millions of Americans fill out every
19 year. *See* 8 C.F.R. § 274a.2. The government has complemented the I-9 process with the
20 E-Verify program, “an internet-based system that allows an employer to verify an
21 employee’s work-authorization status.” *Chicanos Por La Causa, Inc. v. Napolitano*, 558
22 F.3d 856, 862 (9th Cir. 2009).

23 IRCA makes it unlawful for an employer to knowingly hire a person who cannot
24 satisfy the employment verification system. 8 U.S.C. § 1324a(a)(1). This requirement is

25
26 ¹ The parties use various phrases to describe an unauthorized alien, including
27 “undocumented worker” and “illegal immigrant.” The Court uses the term “unauthorized
28 alien” as it is defined in IRCA: “As used in this section, the term ‘unauthorized alien’
means, with respect to the employment of an alien at a particular time, that the alien is
not at that time 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.

1 “enforced through criminal penalties and an escalating series of civil penalties tied to the
2 number of times an employer has violated the provisions.” *Arizona*, 132 S. Ct. at 2504; 8
3 U.S.C. § 1324a(e)-(f). IRCA expressly preempts state or local laws that impose civil or
4 criminal sanctions – other than through licensing and similar laws – on those who employ
5 unauthorized aliens. *Id.* § 1324a(h)(2).

6 IRCA does not impose criminal penalties on unauthorized aliens who merely seek
7 or engage in unauthorized work, *Arizona*, 132 S. Ct. at 2504, but it does criminalize the
8 act of using an “identification document” that is not lawfully issued, or is false, for the
9 purpose of satisfying the employment verification system, 18 U.S.C. § 1546(b). With the
10 Immigration Act of 1990, Congress also imposed civil penalties on persons who use
11 falsified documents to satisfy the employment verification system. Pub. L. No. 101–649,
12 104 Stat. 4978 (1990) (adding 8 U.S.C. § 1324c). Congress has also made the use of
13 false documents for employment a deportable offense. *See* 8 U.S.C. § 1227(a)(1)(B).
14 “Congress has made clear, however, that any information employees submit to indicate
15 their work status ‘may not be used’ for purposes other than prosecution under specified
16 federal criminal statutes for fraud, perjury, and related conduct.” *Arizona*, 132 S. Ct. at
17 2504 (citing 8 U.S.C. §§ 1324a(b)(5), (d)(2)(F)-(G)).

18 A “primary purpose in restricting immigration is to preserve jobs for American
19 workers.” *Nat’l Ctr. for Immigrants’ Rights*, 502 U.S. at 194 (1991) (quoting *Sure-Tan*,
20 *Inc. v. NLRB*, 467 U.S. 883, 893 (1984)). But in passing IRCA, “Congress made a
21 deliberate choice not to impose criminal penalties on aliens who seek, or engage in,
22 unauthorized employment.” *Arizona*, 132 S. Ct. at 2504. “IRCA’s framework reflects a
23 considered judgment that making criminals out of aliens engaged in unauthorized work –
24 aliens who already face the possibility of employer exploitation because of their
25 removable status – would be inconsistent with federal policy and objectives.” *Id.*

26 **B. Arizona’s Identity Theft Laws.**

27 Arizona passed its first identity theft statute in 1996, making it a crime to
28 “knowingly take[] the name, birth date or social security number of another person,

1 without the consent of that person, with the intent to obtain or use the other person's
2 identity for any unlawful purpose or to cause financial loss to the other person." 1996
3 Ariz. Legis. Serv. Ch. 205 (H.B. 2090) (West). Over the next decade, Arizona repeatedly
4 amended this statute – now codified at A.R.S. § 13-2008 – by expanding the definition of
5 identity theft. *See, e.g.*, 2000 Ariz. Legis. Serv. Ch. 189 (H.B. 2428) (West); 2004 Ariz.
6 Legis. Serv. Ch. 109 (H.B. 2116) (West). Arizona also created a new crime of
7 aggravated identity theft under A.R.S. § 13-2009. 2005 Ariz. Legis. Serv. Ch. 190 (S.B.
8 1058) (West).

9 Plaintiffs challenge two bills that amended these identity theft laws to make them
10 applicable to employment of unauthorized aliens. In 2007, Arizona passed H.B. 2779,
11 known as the "Legal Arizona Workers Act." 2007 Ariz. Legis. Serv. Ch. 279 (H.B.
12 2779) (West). The bulk of the bill concerned a new statute, A.R.S. § 13-212, relating to
13 the employment of unauthorized aliens. This new statute prohibited employers from
14 hiring unauthorized aliens and threatened the suspension of licenses if an employer failed
15 to comply. This statute ultimately was held to be constitutional by the United States
16 Supreme Court in *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

17 H.B. 2779 also amended Arizona's aggravated identity theft statute, A.R.S. § 13-
18 2009, by adding the following italicized language:

19 A. A person commits aggravated taking the identity of another person
20 or entity if the person knowingly takes, purchases, manufactures,
21 records, possesses or uses any personal identifying information or
entity identifying information of either . . .

22 3. *Another person, including a real or fictitious person, with the
intent to obtain employment.*

23 *Id.* (amendment in italics).

24 In 2008, Arizona passed H.B. 2745, titled "Employment of Unauthorized Aliens."
25 2008 Ariz. Legis. Serv. Ch. 152 (H.B. 2745) (West). The bill amended and created
26 statutes relating to the employment of unauthorized aliens. *Id.* (amending A.R.S. § 23-
27 212; creating A.R.S. § 23-212.01). The bill also contained provisions that ensured
28 employers' participation in the federal government's e-verify program. As relevant here,

1 H.B. 2745 amended A.R.S. § 13-2008(a) to add the following italicized language:

2 A person commits taking the identity of another person or entity if the
 3 person knowingly takes, purchases, manufactures, records, possesses or
 4 uses any personal identifying information or entity identifying information
 5 of another person or entity, including a real or fictitious person or entity,
 6 without the consent of that other person or entity, with the intent to obtain
 or use the other person's or entity's identity for any unlawful purpose or to
 cause loss to a person or entity whether or not the person or entity actually
 suffers any economic loss as a result of the offense, *or with the intent to
 obtain or continue employment.*

7 *Id.* (amendment in italics).

8 **C. This Lawsuit.**

9 This lawsuit concerns § 13-2009(A)(3), created by H.B. 2779, and the language
 10 added to § 13-2008(A) by H.B. 2745. For the sake of simplicity, the Court will refer to
 11 these challenged provisions as “the identity theft laws.”

12 Plaintiffs argue that the identity theft laws are unconstitutional in two ways. First,
 13 they claim that both laws are preempted by federal immigration law under the Supremacy
 14 Clause of the United States Constitution. Doc. 23, ¶¶ 180-85. Second, they claim that
 15 the identity theft laws “constitute impermissible discrimination against noncitizens on the
 16 basis of alienage” and are facially invalid under the Equal Protection Clause of the
 17 Constitution. Doc. 23, ¶¶ 186-91; *see* Doc. 83 at 18 (agreeing to dismiss their as-applied
 18 equal protection challenge).

19 Plaintiffs include Sara Cervantes Arreola, who was arrested and charged under the
 20 identity theft laws and ultimately convicted under § 13-2009(A)(3). Doc. 23, ¶¶ 147-56.²
 21 She asks the Court to declare the identity theft laws unconstitutional and to expunge the
 22 record of her arrest and conviction. Doc. 23, ¶ 192. Plaintiffs also include Reverend
 23 Susan Frederick-Gray, a Maricopa County taxpayer, and Puente Arizona, a “grassroots”
 24 organization that serves the immigrant community. *Id.*, ¶¶ 9, 12. They ask the Court to
 25 declare the identity theft laws unconstitutional and to permanently enjoin their

26
 27 ² Guadalupe Arredondo was also a Plaintiff at the beginning of this case. After
 28 discovering that she had been arrested by Chandler Police, and not by the Maricopa
 County Sheriff's Office, Ms. Arredondo agreed to dismiss her claims without prejudice
 under Rule 41(a). Doc. 83 at 12 n.5.

1 enforcement by the Maricopa County Defendants. *Id.*, ¶ 192. They also seek to represent
2 a class of unauthorized aliens who could be arrested and prosecuted under the identity
3 theft laws, as well as a class of Maricopa County taxpayers who object to Maricopa
4 County’s use of their tax dollars to fund enforcement of the identity theft laws. Doc. 23,
5 ¶ 169. Finally, Plaintiffs ask the Court to permanently enjoin the Maricopa County
6 Defendants from “using information or documents undocumented workers submit to
7 show federal authorization to work as the basis for any arrest or prosecution.” Doc. 23,
8 ¶ 192. Plaintiffs have sued Joseph M. Arpaio, Sheriff of Maricopa County; Bill
9 Montgomery, County Attorney for Maricopa County; Maricopa County; and the State of
10 Arizona. Doc. 23, ¶¶ 13-16.

11 Plaintiffs’ motion for a preliminary injunction asks the Court to enjoin Defendants
12 from enforcing the identity theft laws during the duration of this lawsuit. Doc. 30. The
13 motion is based only on the Supremacy Clause claim. Defendants have responded and
14 have also filed motions to dismiss. Docs. 53, 55. Defendants argue that (1) Plaintiffs
15 lack standing; (2) Plaintiffs have failed to state a claim under the Equal Protection
16 Clause; (3) Maricopa County is not a proper party under 42 U.S.C. § 1983; and (4) the
17 Court should strike Plaintiffs’ complaint in whole or in part for containing impertinent
18 and irrelevant information. The Court will address the question of standing, the motion
19 for a preliminary injunction, and then the remainder of Defendants’ arguments.

20 **II. Standing.**

21 “In order to invoke the jurisdiction of the federal courts, a plaintiff must establish
22 ‘the irreducible constitutional minimum of standing,’ consisting of three elements: injury
23 in fact, causation, and a likelihood that a favorable decision will redress the plaintiff’s
24 alleged injury.” *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (citing *Lujan v.*
25 *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The injury in fact must constitute
26 “an invasion of a legally protected interest which is (a) concrete and particularized, and
27 (b) actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (citations
28 omitted). Plaintiffs must prove standing for each claim they seek to press and for each

1 form of relief that is sought. *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008).

2 A plaintiff must prove standing “in the same way as any other matter on which the
3 plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required
4 at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561. Ordinarily, “[f]or
5 purposes of ruling on a motion to dismiss for want of standing, both the trial and
6 reviewing courts must accept as true all material allegations of the complaint and must
7 construe the complaint in favor of the complaining party.” *Maya v. Centex Corp.*, 658
8 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).
9 But since Plaintiffs Puente Arizona and Frederick-Gray³ are moving for a preliminary
10 injunction, they must make “a clear showing of each element of standing.” *Townley v.*
11 *Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013); *see Lopez*, 630 F.3d at 785 (“Therefore, at
12 the preliminary injunction stage, a plaintiff must make a ‘clear showing’ of his injury in
13 fact.”).

14 **A. Sara Cervantes Arreola.**

15 Sara Cervantes Arreola claims she has standing based on the collateral
16 consequences flowing from her conviction under the identity theft laws. *See* Doc. 83 at
17 4. Defendants argue that Ms. Arreola has not shown an injury in fact sufficient to confer
18 standing. Doc. 53 at 5. Generally, “[p]ast exposure to illegal conduct does not in itself
19 show a present case or controversy regarding injunctive relief . . . if unaccompanied by
20 any continuing, present adverse effects.” *O’Shea v. Littleton*, 414 U.S. 488, 495-96
21 (1974); *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (“Once the convict’s sentence has
22 expired, . . . some concrete and continuing injury . . . – some ‘collateral consequence’ of
23 the conviction – must exist if the suit is to be maintained.”).

24 The Supreme Court has recognized a presumption “that a wrongful criminal
25 conviction has continuing collateral consequences[.]” *Spencer*, 523 U.S. at 8 (citing
26 *Sibron v. New York*, 392 U.S. 40, 55-56 (1968)). “Once convicted, one remains forever

27
28 ³ Plaintiff Sara Cervantes Arreola is seeking declaratory relief and a separate
injunction that is not at issue in Plaintiffs’ motion for a preliminary injunction. *See*
Doc. 83 at 12 (explaining relief sought by Plaintiff Arreola); Doc. 23, ¶ 192.

1 subject to the prospect of harsher punishment for a subsequent offense as a result of
2 federal and state laws that either already have been or may eventually be passed.”
3 *Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994); *see also Chaker v. Crogan*, 428
4 F.3d 1215, 1219 (9th Cir. 2005) (recognizing an “irrefutable presumption that collateral
5 consequences result from any criminal conviction”). Therefore, “there is a presumption
6 of collateral consequences sufficient for standing if the correctness of the conviction is at
7 issue.” *United States v. Palomba*, 182 F.3d 1121, 1123 n.3 (9th Cir. 1999).

8 Plaintiff Arreola continues to suffer the “collateral consequences” of her allegedly
9 unconstitutional conviction. She faces “the prospect of harsher punishment for a
10 subsequent offense[.]” *Chaker*, 428 F.3d at 1219. This injury is traceable to the identity
11 theft laws challenged in this case. Should the Court find the laws unconstitutional, the
12 Court would have the power to redress Ms. Arreola’s injury by expunging her criminal
13 records. *See United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000); *United States*
14 *v. Smith*, 940 F.2d 395, 396 (9th Cir. 1991) (“[W]e have sanctioned the remedy of
15 expunction of [local] criminal records in civil rights cases involving unconstitutional state
16 convictions.”). The Court agrees with Defendants that the power to expunge criminal
17 records is narrow, but the Court need not decide whether to exercise that power at this
18 stage in the litigation. Ms. Arreola has alleged sufficient facts to establish standing.

19 **B. Puente Arizona.**

20 Puente Arizona argues that it has both associational standing to sue on behalf of its
21 members and direct standing to sue on its own behalf. Doc. 83 at 6-11. The Court will
22 address each of these arguments.

23 **1. Associational Standing.**

24 An organization has standing to sue on behalf of its members if “(a) its members
25 would otherwise have standing to sue in their own right; (b) the interests it seeks to
26 protect are germane to the organization’s purposes; and (c) neither the claim asserted nor
27 the relief requested requires the participation of individual members in the lawsuit.”
28 *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000)

1 (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). In
2 assessing whether an association's members would otherwise have standing to sue in
3 their own right, the Court need only find that one member would have standing for each
4 type of relief sought. *United Food & Commercial Workers Union Local 751 v. Brown*
5 *Grp., Inc.*, 517 U.S. 544, 546 (1996); *Valle del Sol*, 732 F.3d at 1014-19.

6 **a. Standing to Sue in Their Own Right.**

7 For the first factor of associational standing, Plaintiffs argue that at least three of
8 Puente's members would have standing to sue in their own right because there is a
9 "credible threat" that they will be prosecuted under the identity theft laws. A credible
10 threat of prosecution can be an injury-in-fact sufficient to confer standing. *Thomas v.*
11 *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). Specifically, a
12 member of Puente could satisfy the injury-in-fact requirement by showing an "intention
13 to engage in a course of conduct arguably affected with a constitutional interest, but
14 proscribed by a statute, and [that] there exists a credible threat of prosecution
15 thereunder." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (quoting
16 *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). The Ninth Circuit has established a
17 three-part test for identifying a credible threat of prosecution: "(1) whether the plaintiffs
18 have articulated a 'concrete plan' to violate the law in question; (2) whether the
19 government has communicated a specific warning or threat to initiate proceedings; and
20 (3) the history of past prosecution or enforcement under the statute." *Oklevueha Native*
21 *Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 835 (9th Cir. 2012) (citing *Thomas*,
22 220 F.3d at 1138). Although *Oklevueha* used this test for the issue of constitutional
23 ripeness, earlier cases have used it for the issue of standing. See *Thomas*, 220 F.3d at
24 1138; *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996).

25 **i. Credible Threat of Prosecution.**

26 The Court finds that three of Puente's members face a credible threat of
27 prosecution under the identity theft laws. Plaintiffs have submitted anonymous affidavits
28

1 from three members. Doc. 130-1.⁴ Each affiant declares that he or she is living in
2 Arizona, is an active member of Puente, and has used the social security number and
3 green card of another to obtain his or her current job. *Id.* This conduct falls within the
4 purview of the identity theft laws. The affiants have not only “articulated a ‘concrete
5 plan’ to violate the law in question,” *Oklevueha*, 676 F.3d at 835, they are currently
6 violating it.

7 There is also a “history of past prosecution or enforcement under the statute.”
8 *Oklevueha*, 676 F.3d at 835. Law enforcement officials in Arizona have arrested and
9 charged thousands of people for identity theft. Doc. 60-4 at 12 (Matthew Bileski and
10 Phillip Stevenson, *Identity Theft Arrest and Case Processing Data* (2013)). In 2010
11 alone, law enforcement charged approximately 1,900 people with identity theft under
12 A.R.S. § 13-2008 and 590 people with aggravated identity theft under A.R.S. § 13-2009.
13 *Id.* at 12-16. These charges led to over 160 convictions. *Id.* Since November 22, 2010,
14 the Maricopa County Attorney’s Office has filed approximately 194 cases under A.R.S.
15 § 13-2008(A) where there was a known victim. Doc. 85 at 3. As a method of enforcing
16 the identity theft laws, the Maricopa County Sheriff’s Office has at times raided private
17 establishments and arrested individuals who were using fraudulent identification. *See*,
18 *e.g.*, Doc. 30-7 (Declaration of Sara Arreola). Many, though not all, of the people
19 charged under these statutes are unauthorized aliens. *See, e.g., id.*; Doc. 30-3 at 51.

20 For the remaining prong of the credible threat test, Defendants argue that they
21 have not “communicated a specific warning or threat to initiate proceedings” against
22 Plaintiffs. Doc. 132. They emphasize that “the mere existence of a proscriptive statute

23
24 ⁴ Plaintiffs initially submitted affidavits of Puente’s director, stating that members
25 of Puente were violating the identity theft laws and faced a credible threat of prosecution.
26 Docs. 30-4, 95-2. The Court found these affidavits insufficient, Doc. 129 (citing
27 *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009)), and permitted Plaintiffs to submit
28 anonymous affidavits of Puente members, Doc. 129 (citing *Does I thru XXIII v.*
Advanced Textile Corp., 214 F.3d 1058 (9th Cir. 2000)). Defendants argue that they did
not have an opportunity to be heard on the issue of anonymous affidavits. Doc. 132 at 2.
The Court does not agree. The issue was first raised in Plaintiffs’ motion for preliminary
injunction. Doc. 30 at 28. The issue was also raised during oral argument. Doc. 111 at
30-32. Defendants had the opportunity to address this issue in their responses to the
motion for preliminary injunction and in the various briefs they filed after oral argument.

1 [or] a generalized threat of prosecution,” *Thomas*, 220 F.3d at 1139, is not sufficient to
2 confer standing. They also point to a recent decision by the Maricopa County Sheriff’s
3 Office (“MCSO”) to stop enforcing the identity theft laws. And they argue that Plaintiffs
4 do not face a threat of prosecution because they will be eligible for employment
5 authorization documents under the federal government’s recent expansion of its deferred
6 action policy.

7 The Court is not persuaded by these arguments. The question of “whether the
8 prosecuting authorities have communicated a specific warning or threat to initiate
9 proceedings” is merely one factor in “evaluating the genuineness of a claimed threat to
10 initiate proceedings.” *Valle del Sol*, 732 F.3d at 1016 (quoting *Thomas*, 220 F.3d at
11 1139). It is less relevant when there is a clear history of enforcing the law in question.
12 “[A] history of past enforcement against parties similarly situated to the plaintiffs cuts in
13 favor of a conclusion that a threat is specific and credible.” *Lopez*, 630 F.3d at 786-87;
14 *see also Susan B. Anthony*, 134 S. Ct. at 2345 (“[P]ast enforcement against the same
15 conduct is good evidence that the threat of enforcement is not ‘chimerical’”) (quoting
16 *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Here, Plaintiffs currently are violating
17 the identity theft laws and there is a long history of enforcement of those laws. This is
18 sufficient for a pre-enforcement challenge.

19 The MCSO’s recent decision to stop enforcing the identity theft laws does not
20 alter this conclusion. Other law enforcement agencies within Maricopa County remain
21 capable of enforcing these laws. Although Defendants argue that enforcement by other
22 agencies “is not redressable because none of those other agencies are defendants,”
23 Doc. 132 at 4, the Maricopa County Attorney remains a defendant and he may prosecute
24 persons arrested by city police departments within Maricopa County, *see* A.R.S. § 11-109
25 (defining boundaries of Maricopa County); A.R.S. § 11-532 (defining powers of the
26 county attorney). In addition, the MCSO’s recent decision is not yet in effect. Doc. 131-
27 1 at 3 (“[T]he Criminal Employment Unit (CEU) will be disbanded after the current
28 identity theft investigation concludes in the end of January or early February of 2015.”).

1 As of the date of this order, Plaintiffs continue to face a threat of prosecution. Finally,
2 Defendants have identified nothing that would prevent the MCSO from resuming
3 enforcement of the identity theft laws at a later date.

4 Nor have Defendants clearly shown that the anonymous affiants are eligible for
5 employment authorization documents. The federal government did recently expand its
6 deferred action program. *See* Memorandum of Secretary of Department of Homeland
7 Security, *Exercising Prosecutorial Discretion* (Nov. 20, 2014) (available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf). But even if
8 the affiants meet some of the requirements of that program, their receipt of deferred
9 action is not guaranteed. “[T]he ultimate judgment as to whether an immigrant is granted
10 deferred action will be determined on a case-by-case basis.” *Id.* at 5. Furthermore, the
11 newly expanded program may not begin until May of 2015. *Id.* Until that time, the three
12 members of Puente who submitted anonymous affidavits face a credible threat of
13 prosecution under the identity theft laws.
14

15 **ii. Constitutional Interests Factor.**

16 The Supreme Court has said that a pre-enforcement challenge may be brought by a
17 plaintiff who alleges “an intention to engage in a course of conduct *arguably affected*
18 *with a constitutional interest[.]*” *Susan B. Anthony*, 134 S. Ct. at 2342 (quoting *Babbitt*,
19 442 U.S. at 298) (emphasis added). Although courts often quote this language in pre-
20 enforcement challenge cases, they have not explained its meaning or whether it is always
21 required. Some cases appear to treat this language as a threshold requirement for pre-
22 enforcement challenges, *see, e.g., Sturgeon v. Masica*, 768 F.3d 1066, 1071-72 (9th Cir.
23 2014), while others ignore it entirely, *see, e.g., Holder v. Humanitarian Law Project*, 561
24 U.S. 1, 15 (2010), *Thomas*, 220 F.3d 1134, *San Diego Cnty. Gun Rights Comm.*, 98 F.3d
25 1121. Without deciding whether this constitutional interest requirement applies to all
26 pre-enforcement challenges, the Court notes that the Ninth Circuit has found it satisfied
27 when a plaintiff challenges a law on constitutional grounds. In *Valle del Sol*, the plaintiff
28 brought a pre-enforcement challenge to an immigration-related law on Supremacy Clause

1 grounds. 732 F.3d at 1015. The Ninth Circuit cited the constitutional interest language
2 and then found that the plaintiff had standing because she “has established a credible
3 threat of prosecution under this statute, which she challenges on constitutional grounds.”
4 *Id.* Here also, Puente’s members have established a credible threat of prosecution and
5 challenge the identity theft laws under the Supremacy Clause.

6 **iii. First Factor Conclusion.**

7 Three of Puente’s members have shown that they are suffering an injury-in-fact
8 due to the credible threat of prosecution they face under the identity theft laws. This
9 injury is traceable to Defendants who are enforcing the laws, and a favorable decision for
10 Plaintiffs would redress this injury by enjoining such enforcement. Plaintiffs have made
11 a clear showing that the three members of Puente would have standing to sue in their own
12 right.

13 **b. Remaining Factors of Associational Standing.**

14 The second factor for associational standing is whether “the interests [Puente]
15 seeks to protect are germane to the organization’s purposes.” *Ecological Rights*, 230
16 F.3d at 1147. This prong requires only “mere pertinence between litigation subject and
17 organizational purpose.” *Presidio Golf Club v. Nat’l Park Serv.*, 155 F.3d 1153, 1159
18 (9th Cir. 1998) (quoting *Humane Soc’y of the United States v. Hodel*, 840 F.2d 45, 58
19 (D.C. Cir. 1988)). Puente’s mission is to “develop, educate, and empower migrant
20 communities to enhance the quality of life of our community members.” Doc. 104 at 5;
21 Doc. 30-4, ¶¶ 6, 9. The subject matter of this litigation – identity theft laws applied to
22 unauthorized aliens – is pertinent to this organizational mission.

23 The third factor is also satisfied because “neither the claim asserted nor the relief
24 requested requires the participation of individual members in the lawsuit.” *Ecological*
25 *Rights*, 230 F.3d at 1147. The individual members of Puente would assert the same right
26 being asserted by Plaintiffs – the right not to be prosecuted under unconstitutional laws –
27 and their individual backgrounds and circumstances would be irrelevant to determining
28 the constitutionality of the identity theft laws.

1 The Court finds that Puente has made a clear showing that it satisfies the three
2 requirements for associational standing.

3 **2. Direct Standing of Puente.⁵**

4 A “concrete and demonstrable injury to the organization’s activities – with the
5 consequent drain on the organization’s resources –” is sufficient to confer direct standing
6 on an organization. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The
7 Ninth Circuit has “interpreted *Havens* to stand for the proposition that an organization
8 may satisfy the Article III requirement of injury in fact if it can demonstrate:
9 (1) frustration of its organizational mission; and (2) diversion of its resources to combat
10 the [effects of the particular law] in question.” *Smith v. Pac. Properties & Dev. Corp.*,
11 358 F.3d 1097, 1105 (9th Cir. 2004) (citing *Fair Hous. of Marin v. Combs*, 285 F.3d 899,
12 905 (9th Cir. 2002)). An organization cannot, however, “manufacture the injury by
13 incurring litigation costs or simply choosing to spend money fixing a problem that
14 otherwise would not affect the organization at all. It must instead show that it would
15 have suffered some other injury if it had not diverted resources to counteracting the
16 problem.” *Valle del Sol*, 732 F.3d at 1018 (quoting *La Asociacion de Trabajadores de*
17 *Lake Forest v. Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (citations omitted)).

18 Puente Arizona has established standing under this test. The declaration of Carlos
19 Garcia, the executive director of Puente, establishes that Puente is a community-based
20 organization with more than two-hundred members, many of whom are unauthorized
21 aliens. Doc. 30-4. Puente serves its members through English classes, “know-your rights
22 workshops,” and other educational programs. Mr. Garcia knows many members who
23 have used false information to obtain employment and who face prosecution under the
24 identity theft laws. Mr. Garcia’s declaration shows that enforcement of the identity theft

25
26 ⁵ The Court need “only conclude that one of the plaintiffs has standing in order to
27 consider the merits of the plaintiffs’ claim,” *Valle del Sol*, 732 F.3d at 1014, but the Court
28 will address the standing of all Plaintiffs because Defendants’ motion to dismiss
challenges that standing, Doc. 53 at 5.

1 laws has injured Puente Arizona in two ways. First, many Puente members, including
2 leaders, have reduced their participation in Puente's activities because the identity theft
3 laws have caused financial difficulties and made them afraid of arrest and retaliation.
4 *See, e.g.*, Doc. 30-4, ¶¶ 16, 20-21, 24, 26. Second, Puente has diverted substantial
5 resources to respond to the workplace raids through which the MCSO has enforced the
6 identity theft laws. *See, e.g., id.* ¶¶ 28-40. The declaration of Noemi Romero, a member
7 of Puente, corroborates Mr. Garcia's declaration. Doc. 30-6 (describing how Puente
8 helped Ms. Romero after she had been arrested during a workplace raid).

9 These are the kind of injuries that the Ninth Circuit has found sufficient to confer
10 direct standing on an organization. In *Valle del Sol*, a group of plaintiffs challenged an
11 Arizona law that criminalized the act of harboring or transporting unauthorized aliens.
12 732 F.3d at 1012-13. Through written declarations, various organizations claimed that
13 the law deterred participation and required them to divert resources to educate their
14 members. *Id.* at 1018. *Valle del Sol* found that the organizations had made a clear
15 showing of injury. *Id.*; *see also Fair Hous. Council of San Fernando Valley v.*
16 *Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (finding organizational
17 standing at the preliminary injunction stage because the organization had "investigated
18 Roommate's alleged violations and, in response, started new education and outreach
19 campaigns targeted at discriminatory roommate advertising").

20 Puente has shown that enforcement of the identity theft laws has deterred
21 participation, thereby frustrating its mission, and forced it to divert resources. This is an
22 injury fairly traceable to the conduct of Defendants that would be redressed by a
23 favorable decision. Puente has made a clear showing of its direct standing.

24 **C. Reverend Frederick-Gray.**

25 Reverend Frederick-Gray claims standing as a Maricopa County taxpayer.
26 Doc. 23, ¶¶ 165-68. She objects to the Maricopa County Defendants' enforcement of the
27 identity theft laws as an illegal expenditure of county taxpayer funds. *Id.*; *see* Doc. 30-8
28 (Reverend Frederick-Gray's Declaration). Defendants argue that Reverend Frederick-

1 Gray's status as a taxpayer is insufficient to confer standing. Doc. 53 at 7-10. But
2 Defendants conflate the standards for federal and state taxpayer standing with the
3 standards for municipal taxpayer standing. Taxpayers generally are not able to challenge
4 an illegal expenditure of federal or state funds. *See Frothingham v. Mellon*, 262 U.S.
5 447, 487-88 (1923) (finding that the "relation of a taxpayer of the United States to the
6 federal government . . . is shared with millions of others, [and] is comparatively minute
7 and indeterminable"); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344-46 (2006)
8 (finding that state taxpayers have no standing to challenge state tax or spending decisions
9 simply by virtue of their status as taxpayers).

10 The Supreme Court has recognized a different standard for municipal taxpayer
11 standing:

12 The interest of a taxpayer of a municipality in the application of its moneys
13 is direct and immediate and the remedy by injunction to prevent their
14 misuse is not inappropriate. It is upheld by a large number of state cases
15 and is the rule of this court. . . . The reasons which support the extension of
16 the equitable remedy to a single taxpayer in such cases are based upon the
17 peculiar relation of the corporate taxpayer to the corporation which is not
18 without some resemblance to that subsisting between stockholder and
19 private corporation.

20 *Frothingham*, 262 U.S. at 486-87 (citations omitted); *see also DaimlerChrysler*, 547 U.S.
21 at 349 (noting the separate standard for municipal taxpayer standing). Although the
22 reasoning in *Frothingham* "could be questioned in an age in which some cities boast
23 populations in the millions," *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197,
24 210 (6th Cir. 2011), courts still adhere to its holding on municipal taxpayer standing. *See*
25 *id.*; *Pelphrey v. Cobb Cnty., Ga.*, 547 F.3d 1263, 1280-81 (11th Cir. 2008); *United States*
26 *v. City of New York*, 972 F.2d 464, 470-71 (2d Cir. 1992); *Cammack v. Waihee*, 932 F.2d
27 765, 770 (9th Cir. 1991); *D.C. Common Cause v. D.C.*, 858 F.2d 1, 4-5 (D.C. Cir. 1988).⁶

28 ⁶ In his reply brief, Defendant Arpaio argues that the term 'municipal' can only
mean a city or town and does not apply to county taxpayers. Doc. 116 at 6. But courts
have applied the doctrine of municipal taxpayer standing to county taxpayers. *See*
Pelphrey v. Cobb Cnty., Ga., 547 F.3d 1263 (11th Cir. 2008); *We Are Am./Somos Am.,*
Coal. of Arizona v. Maricopa Cnty. Bd. of Supervisors, 809 F. Supp. 2d 1084 (D. Ariz.
2011). This is consistent with how Black's Law Dictionary (9th ed. 2009) defines the
term 'municipal': "Of or relating to a city, town, or local governmental unit."
Furthermore, courts in other contexts have found that the term municipal includes county

1 The Ninth Circuit has applied the “requirement of a pocketbook injury” to
2 municipal taxpayer standing. *Cammack*, 932 F.2d at 770. This means that “municipal
3 taxpayer standing simply requires the ‘injury’ of an allegedly improper expenditure of
4 municipal funds[.]” *Id.*; see also *Barnes–Wallace v. City of San Diego*, 530 F.3d 776,
5 786 (9th Cir. 2008) (“[M]unicipal taxpayers must show an expenditure of public funds to
6 have standing.”); *We Are Am./Somos Am., Coal. of Arizona v. Maricopa Cnty. Bd. of*
7 *Supervisors*, 809 F. Supp. 2d 1084, 1108 (D. Ariz. 2011) (finding that “‘improper
8 expenditure of public funds’ is the crux of any claim that a municipal taxpayer satisfies
9 the injury in fact prong of constitutional standing”). This standard is less stringent than
10 that applied for federal and state taxpayer standing, as there is a “direct and immediate”
11 relation of a taxpayer with her municipality. See *DaimlerChrysler*, 547 U.S. at 349.

12 There is some uncertainty as to whether a municipal taxpayer must prove the
13 amount that a municipality has spent enforcing an unconstitutional law. See, e.g.,
14 *Cammack*, 932 F.2d at 771 (noting that plaintiffs “specifically have stated the amount of
15 funds appropriated and allegedly spent”); *We Are Am.*, 809 F. Supp. 2d at 1110 (noting
16 that although an allegation of improper expenditure is sufficient to survive a motion to
17 dismiss, proof of the amount expended may be necessary later in the case). The Court
18 finds that proof of the amount expended on enforcing the identity theft laws is not
19 necessary for Reverend Frederick-Gray to make a clear showing of standing. The record
20 shows that the Maricopa County Defendants spent taxpayer dollars arresting, jailing, and
21 convicting Plaintiff Sara Arreola under A.R.S. § 13-2009(A)(3). See Doc. 69-1 at 34;
22 Doc. 30-7. The precise amount that Defendants spent on this action is irrelevant to the
23 essential nature of Reverend Frederick-Gray’s alleged injury – the improper expenditure
24 of taxpayer funds. This injury is fairly traceable to Defendants’ conduct in enforcing the
25 identity theft laws, and a favorable decision would redress Reverend Frederick-Gray’s
26 injury by preventing further expenditures for enforcement of the identity theft laws. See,

27
28

governments. *Bd. of Cnty. Comm’rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397 (1997)
(finding that municipal liability under § 1983 applied to a county government).

1 e.g., *We Are Am.*, 809 F. Supp. 2d at 1111; *Hinrichs v. Bosma*, 440 F.3d 393, 397-98 (7th
2 Cir. 2006) (“Such an injury is redressed not by giving the tax money back . . . but by
3 ending the unconstitutional spending practice.”) (citations omitted). The Court finds that
4 Reverend Frederick-Gray has made a clear showing of standing.

5 **III. Preliminary Injunction.**

6 A preliminary injunction “is an extraordinary and drastic remedy, one that should
7 not be granted unless the movant, by a clear showing, carries the burden of persuasion.”
8 *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quoting 11A C. Wright,
9 A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, 129-130 (2d ed. 1995)).
10 An injunction may be granted when the movant shows that “he is likely to succeed on
11 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
12 that the balance of equities tips in his favor, and that an injunction is in the public
13 interest.” *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th
14 Cir. 2009) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). In
15 this circuit, a preliminary injunction may also be issued when a plaintiff shows that
16 “serious questions going to the merits were raised and the balance of hardships tips
17 sharply in [plaintiff’s] favor.” *Alliance for the Wild Rockies v. Cottrell*, 632 F. 3d 1127,
18 1134-35 (9th Cir. 2011) (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir.
19 2008)). The movant has the burden of proof on each element of the test. *Envtl. Council*
20 *of Sacramento v. Slater*, 184 F. Supp. 2d 1016, 1027 (E.D. Cal. 2000).

21 **A. Likelihood of Success on the Merits.**

22 Plaintiffs base their request for a preliminary injunction on their claim that the
23 identity theft laws are preempted under the Supremacy Clause. “The Supremacy Clause
24 provides a clear rule that federal law ‘shall be the supreme Law of the Land; and the
25 Judges in every State shall be bound thereby, anything in the Constitution or Laws of any
26 State to the Contrary notwithstanding.” *Arizona*, 132 S. Ct. at 2500 (quoting U.S. Const.
27 art. VI, cl. 2). Under this rule, “Congress has the power to preempt state law.” *Crosby v.*
28 *Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000). “[T]he purpose of Congress is

1 the ultimate touchstone in every pre-emption case.” *Wyeth v. Levine*, 555 U.S. 555, 565
2 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The preemption
3 doctrine consists of three well-recognized classes: express, field, and conflict preemption.
4 *Arizona*, 132 S. Ct. at 2500-01. Express preemption occurs when Congress “withdraw[s]
5 specified powers from the States by enacting a statute containing an express preemption
6 provision.” *Id.* (citing *Whiting*, 131 S. Ct. at 1974-75). Field preemption precludes states
7 “from regulating conduct in a field that Congress, acting within its proper authority, has
8 determined must be regulated by its exclusive governance.” *Id.* at 2501 (citing *Gade v.*
9 *Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 115 (1992)). Conflict preemption occurs
10 “where ‘compliance with both federal and state regulations is a physical impossibility,’
11 *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), and in
12 those instances where the challenged state law ‘stands as an obstacle to the
13 accomplishment and execution of the full purposes and objectives of Congress,’ *Hines v.*
14 *Davidowitz*, 312 U.S. 52, 67 (1941).” *Id.* In resolving preemption challenges to state
15 laws, “courts should assume that ‘the historic police powers of the States’ are not
16 superseded ‘unless that was the clear and manifest purpose of Congress.’” *Id.* (quoting
17 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

18 Plaintiffs do not claim that the identity theft laws are expressly preempted. They
19 rely instead on field and conflict preemption.

20 **1. Purpose and Effect of Identity Theft Laws.**

21 Before discussing field and conflict preemption, the Court must address
22 Defendants’ argument that preemption analysis does not apply because the identity theft
23 laws are facially neutral as to immigration and unauthorized aliens. *See, e.g.*, Doc. 60 at
24 9-12; Doc. 75 at 11-13. The challenged laws are facially neutral. They criminalize use
25 of the personal identifying information of another person, whether real or fictitious, with
26 the intent to obtain or continue employment, regardless of the immigration status of the
27 person using the information. A.R.S. §§ 13-2008(A), 13-2009(A). They apply equally to
28 unauthorized aliens and United States citizens.

1 In a preemption case, however, the Court may consider not only the face of a state
2 law, but also its purpose and effect.⁷ See *New York State Conference of Blue Cross &*
3 *Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1995) (considering the
4 “purpose and the effects” of the challenged state law). This requires consideration of the
5 “purpose and intent of the body passing the law at issue,” *Tillison v. City of San Diego*,
6 406 F.3d 1126, 1129 (9th Cir. 2005), and “any specific expressions of legislative intent in
7 the statute itself as well as the legislative history,” *Cal. Tow Truck Ass’n v. City & Cnty.*
8 *of San Francisco*, 693 F.3d 847, 859 (9th Cir. 2012).

9 In assessing the impact of a state law on a federal scheme, courts “have refused to
10 rely solely on the legislature’s professed purpose and have looked as well to the effects of
11 the law.” *Gade*, 505 U.S. at 105; see also *English v. Gen. Elec. Co.*, 496 U.S. 72, 84
12 (1990). “[W]hen considering the purpose of a challenged statute, [courts are] not bound
13 by ‘[t]he name, description or characterization given it by the legislature or the courts of
14 the State,’ but will determine for [themselves] the practical impact of the law.” *Hughes v.*
15 *Oklahoma*, 441 U.S. 322, 336 (1979) (cited by *Gade*, 505 U.S. at 106) (citation omitted).
16 A state law may not “frustrate the operation of federal law [even if] the state legislature in
17 passing its law had some purpose in mind other than one of frustration.” *Perez v.*
18 *Campbell*, 402 U.S. 637, 651-52 (1971).

19 Here, a primary purpose and effect of the identity theft laws is to impose criminal
20 penalties on unauthorized aliens who seek or engage in unauthorized employment. The
21 titles of H.B. 2779 and H.B. 2745 – the “Legal Arizona Workers’ Act” and “Employment
22 of Unauthorized Aliens” – reflect a clear intent to regulate employment of unauthorized
23 aliens. The bills that enacted the identity theft laws included other provisions that related
24 almost entirely to employment of unauthorized aliens, as discussed above. The identity

25
26 ⁷ Defendants argue that because the language of the identity theft laws is
27 unambiguous, the Court should not consider legislative purpose and history. The cases
28 they cite, however, address issues of statutory construction, not preemption. See, e.g.,
United States v. James, 478 U.S. 597, 606 (1986); *Rubin v. United States*, 449 U.S. 424,
430 (1981); *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108
(1980).

1 theft laws will also have the most impact on unauthorized aliens, who often use the
2 “personal identifying information” of another person to “obtain or continue”
3 employment. *See, e.g.*, Doc. 30-3 at 51 (MCSO News Release, stating that “100% of all
4 suspects found to be committing identity theft to gain employment were illegal aliens”).

5 The legislative history also indicates a purpose to regulate unauthorized aliens
6 who seek employment. When arguing in support of H.B. 2779’s amendment to A.R.S.
7 § 13-2009(A), Senator O’Halleran stated that people convicted under the identity theft
8 law would be encouraged to “self-deport” instead of serving long prison sentences.
9 Doc. 30-3 at 45. Senator Robert Burns supported H.B. 2779 because it would show that
10 Arizona was tough on illegal immigration. *Id.* at 42. Similarly, Representative Russell
11 Pearce – a sponsor of H.B. 2779 and H.B. 2745 (Doc. 30-2 at 55, 69) – made clear that
12 H.B. 2779 was designed to address the problem of illegal immigration. Doc. 30-3 at 4-7.
13 When signing H.B. 2779 into law, Governor Napolitano noted that a “state like Arizona
14 [has] no choice but to take strong action to discourage the further flow of illegal
15 immigration through our borders.” 2007 Ariz. Legis. Serv. Ch. 279 (H.B. 2779) (West).

16 Defendants provide no legislative history that shows a contrary intent. Indeed,
17 Defendants suggested during oral argument that there simply is no legislative history
18 pertaining to the identity theft laws. Doc. 111 at 51-52. They argued that because H.B.
19 2779 and H.B. 2745 contain multiple provisions, the Court cannot connect the legislative
20 history to the specific identity theft provisions at issue in this case. The Court finds this
21 argument unpersuasive because the various provisions of the bills all relate to the
22 employment of unauthorized aliens.

23 Considering the text, purpose, and effect of the identity theft laws, the Court finds
24 that they are aimed at imposing criminal penalties on unauthorized aliens who seek or
25 engage in unauthorized employment in the State of Arizona. It is therefore appropriate to
26 consider the preemptive effect of federal immigration law.

27 **2. Field Preemption.**

28 “States are precluded from regulating conduct in a field that Congress, acting

1 within its proper authority, has determined must be regulated by its exclusive
2 governance.” *Arizona*, 132 S. Ct. at 2501. “[F]ield preemption can be inferred either
3 where there is a regulatory framework ‘so pervasive . . . that Congress left no room for
4 the States to supplement it’ or where the ‘federal interest [is] so dominant that the federal
5 system will be assumed to preclude enforcement of state laws on the same subject.’”
6 *Valle del Sol*, 732 F.3d at 1023 (quoting *Arizona*, 132 S. Ct. at 2501). “Where Congress
7 occupies an entire field, . . . even complementary state regulation is impermissible.”
8 *Arizona*, 132 S. Ct. at 2501.

9 When asked during oral argument to identify the precise field occupied by
10 Congress, Plaintiffs’ counsel identified two: the regulation of unauthorized-alien
11 employment and the regulation of unauthorized-alien fraud to circumvent the federal
12 employment verification system. Doc. 111 at 18. In *Arizona*, the Supreme Court did not
13 conclude that Congress had occupied the field of unauthorized-alien employment.
14 Although it noted that Congress has regulated that field extensively, it applied conflict
15 preemption in striking down an Arizona law that made it a crime for unauthorized aliens
16 to seek employment. *Arizona*, 132 S. Ct. at 2503-05. If the Supreme Court did not find
17 the field of unauthorized-alien employment preempted, this Court is not likely to either.

18 The narrower field identified by Plaintiffs – unauthorized-alien fraud in seeking
19 employment – has been heavily and comprehensively regulated by Congress. As noted
20 above, Congress requires employers to verify the authorized status of aliens seeking
21 employment and has established an entire federal system for employment verification.
22 Employers must comply with the program and verify that applicants are authorized to
23 work in the United States, and applicants must submit specified documents for use in the
24 verification system. To combat fraud in obtaining employment, IRCA makes it a federal
25 crime for an applicant to use a false identification document for the purpose of satisfying
26 the federal employment verification system. 18 U.S.C. § 1546(b). IRCA also expands
27 the crimes for selling, making, or using fraudulent immigration documents to include
28 those used “as evidence of authorized . . . employment in the United States.” *Id.*

1 § 1546(a). And IRCA specifically identifies other federal criminal statutes that can be
2 applied to fraud in the employment verification process. *See* Pub. L. 99-603, § 101
3 (adding 8 U.S.C. § 1324a(b)(5) and listing applicable statutes in Title 18, §§ 1001 [false
4 statements], 1028 [fraud in connection with identity documents], 1546, and 1621
5 [perjury]).

6 Congress has also enacted laws that impose civil penalties on persons who use
7 false documents to satisfy the employment verification system. 8 U.S.C. § 1324c. And
8 Congress has made the use of false employment documents a basis for deportation. 8
9 U.S.C. § 1227; *see also id.* § 1182(a)(6)(C) (making those who make false claims to
10 citizenship, including for purposes of establishing eligibility for employment,
11 inadmissible and thus ineligible for adjustment of status to that of a lawful permanent
12 resident).

13 Congress has even regulated the law enforcement use that may be made of
14 documents submitted for federal employment verification. IRCA provides that any
15 information employees submit to indicate their work status “may not be used” for
16 purposes other than prosecution under specified federal criminal statutes for fraud,
17 perjury, and related conduct – an evident attempt to limit states from using these
18 documents to prosecute crimes. *See* 8 U.S.C. §§ 1324a(b)(5), (d)(2)(F)-(G).

19 These provisions evince an intent to occupy the field of regulating fraud against
20 the federal employment verification system. Congress has imposed every kind of penalty
21 that can arise from an unauthorized alien’s use of false documents to secure employment
22 – criminal, civil, and immigration – and has expressly limited States’ use of federal
23 employment verification documents. The Court concludes that Congress has occupied
24 the field of unauthorized-alien fraud in obtaining employment. As a result, the identity
25 theft laws, which have the purpose and effect of regulating the same field, are likely
26 preempted.

27 In *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013), the Fourth
28 Circuit interpreted the same federal laws that are at issue here and found that they

1 occupied the field of creating, possessing, and using fraudulent immigration documents.
2 At issue was a South Carolina law that made it unlawful for a person to display or
3 possess a false form of identification for the purpose of proving lawful presence in the
4 United States. *Id.* at 532. South Carolina argued that the law did not relate to
5 immigration and instead addressed ordinary fraud. *Id.* The Fourth Circuit disagreed,
6 finding that the law was “field preempted in that Congress has passed several laws
7 dealing with creating, possessing, and using fraudulent immigration documents.” *Id.* at
8 533 (citing 8 U.S.C. § 1324c(a)(1)-(2); 18 U.S.C. § 1546). Although the state law in
9 *South Carolina* dealt with use of false identification to “prove lawful presence” – not to
10 “obtain or continue employment” – the reasoning in *South Carolina* supports the Court’s
11 conclusion that Plaintiffs are likely to prevail on their claim that Congress has occupied
12 the field of regulating fraud in the employment verification process. Other cases also
13 support this conclusion. *See, e.g., Arizona*, 132 S. Ct. at 2503 (finding that federal alien
14 registration laws occupied a field); *Hines*, 312 U.S. at 66-67 (same); *Valle del Sol*, 732
15 F.3d at 1026 (finding that 8 U.S.C. § 1324 occupied the field of regulating the
16 transportation and harboring of unauthorized aliens).

17 3. Conflict Preemption.

18 Conflict preemption may occur if a state law “stands as an obstacle to the
19 accomplishment and execution of the full purposes and objectives of Congress.”
20 *Arizona*, 132 S. Ct. at 2501 (quoting *Hines*, 312 U.S. at 67). But direct conflict between
21 the state and federal law is not required. Even when state and federal laws have the same
22 general objective, an “inconsistency of sanctions” between the two laws may
23 “undermine[] the congressional calibration of force.” *Crosby*, 530 U.S. at 380. As the
24 Supreme Court has explained, a “[c]onflict in technique can be fully as disruptive to the
25 system Congress enacted as conflict in overt policy.” *Arizona*, 132 S. Ct. at 2505
26 (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971)).

27 Arizona’s identity theft laws pursue essentially the same purpose as the federal
28 statutes described above – they seek to deter unauthorized aliens from obtaining

1 employment through the use of fraudulent documents. But the two sets of laws adopt
2 different sanctions. The Arizona identity theft laws include only a criminal sanction.
3 They make the use of false documents to obtain employment a felony offense punishable
4 by a prison term that may exceed five years. *See* A.R.S. §§ 13-2008, 13-2009; 13-702,
5 13-703 (sentencing statutes). Under the federal scheme, federal authorities have a range
6 of options. They may impose civil penalties under 8 U.S.C. § 1324c or immigration
7 consequences under 8 U.S.C. § 1227 and § 1182(a)(6)(C). They may pursue criminal
8 sanctions under 18 U.S.C. § 1546, but only for prison sentences of five years or less. *Id.*
9 § 1546(b).

10 The overlapping penalties created by the Arizona identity theft statutes, which
11 “layer additional penalties atop federal law,” likely result in conflict preemption.
12 *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1267
13 (11th Cir. 2012). The Arizona laws “conflict[] with the federal scheme by divesting
14 federal authorities of the exclusive power to prosecute these crimes.” *Valle del Sol*, 732
15 F.3d at 1027. As the Supreme Court has explained, “‘conflict is imminent’ whenever
16 ‘two separate remedies are brought to bear on the same activity.’” *Wisconsin Dep’t of*
17 *Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986) (quoting
18 *Garner v. Teamsters*, 346 U.S. 485, 498-99 (1953)).

19 In *Arizona*, the Supreme Court considered an Arizona law similar in nature to the
20 identity theft laws. The law made it a state misdemeanor for “an unauthorized alien to
21 knowingly apply for work, solicit work in a public place or perform work as an employee
22 or independent contractor.” 132 S. Ct. at 2503. After analyzing the relevant provisions
23 of IRCA, the Court found:

24 Arizona law would interfere with the careful balance struck by Congress
25 with respect to unauthorized employment of aliens. Although [the Arizona
26 law] attempts to achieve one of the same goals as federal law – the
27 deterrence of unlawful employment – it involves a conflict in the method of
enforcement. The Court has recognized that a “[c]onflict in technique can
be fully as disruptive to the system Congress enacted as conflict in overt
policy.”

28 *Id.* at 2504-05 (citations omitted). This reasoning applies here. The Court finds that

1 Plaintiffs are likely to succeed in their claim that the identity theft laws are conflict
2 preempted.

3 **4. Defendants' Arguments.**

4 In addition to their argument regarding the laws' facial neutrality, Defendants
5 make four arguments for why there is no preemption in this case. The Court will address
6 each.

7 First, Defendants argue that because there are constitutional applications of the
8 identity theft laws – namely, to United States citizens – Plaintiffs' facial preemption
9 challenge must fail. Doc. 60 at 11-12. Relying on *United States v. Salerno*, 481 U.S.
10 739, 745 (1987), Defendants argue that a facial preemption challenge can succeed only if
11 the challenger can show “that no set of circumstances exists under which the act would
12 be valid.” The same argument was made in *Lozano v. City of Hazleton*, 724 F.3d 297
13 (3rd Cir. 2013), another case involving a preemption challenge to an immigration-related
14 law. The Third Circuit found that “no part of the majority opinion in *Arizona*, and no
15 part of *Whiting*, references *Salerno* at all. . . . That approach would reject a conflict
16 preemption claim in a facial challenge whenever a defendant can conjure up just one
17 hypothetical factual scenario in which implementation of the state law would not directly
18 interfere with federal law.” *Id.* at 313 n.22. The Court agrees. A law “is not saved from
19 pre-emption simply because the State can demonstrate some additional effect outside of
20 the [preempted area].” *Gade*, 505 U.S. at 107.

21 Second, Defendants emphasize that IRCA expressly preempts “any State or local
22 law imposing civil or criminal sanctions (other than through licensing and similar laws)
23 upon those who employ, or recruit or refer for a fee for employment, unauthorized
24 aliens.” 8 U.S.C. § 1324a(h)(2). Defendants argue that because the express preemption
25 provision is silent as to laws that impose sanctions on unauthorized employees, Congress
26 has impliedly permitted states to pass such laws. Doc. 69 at 11-12. The Supreme Court
27 rejected this argument in *Arizona*: “the existence of an ‘express pre-emption provisio[n]’
28 does *not* bar the ordinary working of conflict pre-emption principles’ or impose a ‘special

1 burden' that would make it more difficult to establish the preemption of laws falling
2 outside the clause." 132 S. Ct. at 2504-05 (quoting *Geier v. American Honda Motor Co.*,
3 529 U.S. 861, 869-72 (2000)) (emphasis in original).

4 Third, Defendant Montgomery argues that because he applies the identity theft
5 laws in a nondiscriminatory manner, without reference to a person's immigration status,
6 the laws cannot be preempted. Doc. 75 at 14-22. Defendant Montgomery emphasizes
7 that he did not lobby for the identity theft laws and has no control over how Sheriff
8 Arpaio enforces the laws. *Id.* These points may well be true, but the issue is not how Mr.
9 Montgomery enforces the identity theft laws. The issue is whether federal immigration
10 law preempts those laws, a question that does not turn on Mr. Montgomery's
11 enforcement practices.

12 Finally, Defendants argue that Plaintiffs have not overcome the presumption
13 against preemption. Doc. 60 at 12; Doc. 69 at 7; Doc. 75 at 7-8; As the Supreme Court
14 explained in *Arizona*, "[i]n preemption analysis, courts should assume that the historic
15 police powers of the States are not superseded unless that was the clear and manifest
16 purpose of Congress." 132 S.Ct. at 2501 (citation and quotation marks omitted). The
17 Court need not decide at this stage whether the regulation of fraud in employment by
18 unauthorized aliens is an area of historic state police powers. Even applying the
19 presumption, the Court finds that Plaintiffs are likely to succeed on the merits because
20 comprehensive regulation of unauthorized-alien fraud in obtaining employment is a clear
21 and manifest purpose of Congress.⁸

22 **B. Likelihood of Irreparable Harm.**

23 Having established Plaintiffs' likelihood of success on the merits, the next issue is
24 whether Plaintiffs are likely to suffer irreparable harm absent the protection of a
25 preliminary injunction. Generally, courts of equity should not act when the moving party

26
27 ⁸ Defendant Arizona argues that the presumption against preemption requires a
28 finding that the state law is preempted "beyond a reasonable doubt," Doc. 60 at 12 (citing
Zadrozny v. Bank of New York Mellon, 720 F.3d 1163 (9th Cir. 2013)), but this is a state-
law standard, not the standard that applies in this federal case. *See, e.g., Arizona v.*
Brown, 85 P.3d 109, 114 (Ariz. Ct. App. 2004).

1 “will not suffer irreparable injury if denied equitable relief.” *Younger v. Harris*, 401 U.S.
2 37, 43-44 (1971). Plaintiffs have the burden to establish that there is a likelihood – not
3 just a possibility – that they will suffer irreparable harm if a preliminary injunction is not
4 entered. *See Winter*, 555 U.S. at 21-23. As the Supreme Court has explained, “[t]he key
5 word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of
6 money, time and energy necessarily expended in the absence of a stay, are not enough.
7 The possibility that adequate compensatory or other corrective relief will be available at a
8 later date, in the ordinary course of litigation, weighs heavily against a claim of
9 irreparable harm.” *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (emphasis in original)
10 (citation omitted); *see also Rent-A-Center, Inc. v. Canyon Television & Appliance*
11 *Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

12 As discussed above, three members of Puente face a credible threat of prosecution
13 under the identity theft laws. Furthermore, Plaintiffs have shown that these laws are
14 likely to be found unconstitutional. “[I]f an individual or entity faces the imminent threat
15 of enforcement of a preempted state law and the resulting injury may not be remedied by
16 monetary damages, the individual or entity is likely to suffer irreparable harm.” *Valle del*
17 *Sol v. Whiting*, No. CV 10-1061-PHX-SRB, 2012 WL 8021265, at *6 (D. Ariz. Sept. 5,
18 2012), *aff’d*, 732 F.3d at 1029 (“[Plaintiffs have] demonstrated a credible threat of
19 prosecution under the statute Thus, the plaintiffs have established a likelihood of
20 irreparable harm.”). The irreparable injury stems from the emotional, reputational, and
21 work-related harms that accompany an illegitimate prosecution. Thus, the Court “may
22 properly enjoin “state officers ‘who threaten and are about to commence proceedings,
23 either of a civil or criminal nature, to enforce against parties affected [by] an
24 unconstitutional act, violating the Federal Constitution.”” *Morales v. Trans World*
25 *Airlines, Inc.*, 504 U.S. 374, 381 (1992) (quoting *Ex parte Young*, 209 U.S. 123, 156
26 (1908)).

27 Defendants argue that Plaintiffs’ six-year delay in bringing this lawsuit shows that
28 their injury is not irreparable. Doc. 69 at 18-20; Doc. 75 at 22-23. A plaintiff’s delay

1 in bringing suit can indicate that the asserted injury is not irreparable. “A preliminary
2 injunction is sought upon the theory that there is an urgent need for speedy action to
3 protect the plaintiff’s rights. By sleeping on its rights a plaintiff demonstrates the lack of
4 need for speedy action.” *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211,
5 1213 (9th Cir. 1984) (quoting *Gillette Co. v. Ed Pinaud, Inc.*, 178 F. Supp. 618, 622
6 (S.D.N.Y. 1959)). Delay, however, “is but a single factor to consider in evaluating
7 irreparable injury; courts are ‘loath to withhold relief solely on that ground.’” *Arc of*
8 *California v. Douglas*, 757 F.3d 975, 990-91 (9th Cir. 2014) (quoting *Lydo*, 745 F.2d at
9 1214). “Although a plaintiff’s failure to seek judicial protection can imply ‘the lack of
10 need for speedy action,’ such tardiness is not particularly probative in the context of
11 ongoing, worsening injuries.” *Id.* at 990 (citations omitted).

12 Delay is not decisive here. As Plaintiffs explain, the case law concerning the
13 preemptive effect of federal immigration law has dramatically expanded over the past
14 few years. Two cases that are key to Plaintiffs’ arguments – *Arizona* and *Valle del Sol* –
15 were decided recently. “[W]aiting to file for preliminary relief until a credible case for
16 irreparable harm can be made is prudent rather than dilatory.” *Arc of California*, 757
17 F.3d at 991. Puente, suing on behalf of its members, has shown a credible threat of
18 prosecution and, therefore, a likelihood of irreparable harm.⁹

19 **C. Balance of Equities and the Public Interest.**

20 The Court finds that the balance of equities tips in favor of Plaintiffs. Enjoining
21 the enforcement of laws that are likely preempted will impose little hardship on
22 Defendants. This is particularly true where Defendants will continue to have other laws
23 with which they can combat identity theft. *See* A.R.S. §§ 13-2002, 13-2008, 13-2009.
24 Plaintiffs, in contrast, have shown a likelihood of irreparable harm if the laws are not
25 enjoined.

26
27 ⁹ Because the Court finds that Plaintiffs have shown a likelihood of irreparable
28 harm to the members on whose behalf Puente is suing, the Court need not address the
likelihood of irreparable harm to other Plaintiffs.

1 The Court also finds that the public interest favors an injunction. The public has
2 little interest in the enforcement of laws that are unconstitutional. The Court recognizes
3 that the crime of identity theft affects the lives of many Arizonans. *See* Doc. 75 at 25-26.
4 But the injunction does not leave Defendants unequipped to combat that crime.

5 **D. Preliminary Injunction Conclusion.**

6 Plaintiffs have shown that they are likely to succeed on the merits, that they are
7 likely to suffer irreparable harm in the absence of a preliminary injunction, and that the
8 balance of equities and public interest favor an injunction. The Court therefore will grant
9 Plaintiffs' request for a preliminary injunction and enjoin Defendants from enforcing
10 A.R.S. § 13-2009(A)(3) and the portion of A.R.S. § 13-2008(A) that addresses actions
11 committed "with the intent to obtain or continue employment."¹⁰

12 **IV. Motions to Dismiss.**

13 Defendants argue that Plaintiffs have failed to state a claim under the Equal
14 Protection Clause and against Maricopa County, and that the Court should strike
15 Plaintiffs' complaint in whole or in part for containing impertinent and irrelevant
16 information. Doc. 53, Doc. 55. Defendants also make standing arguments the Court has
17 addressed above.

18 **A. Equal Protection Claim.**

19 "The first step in determining whether a law violates the Equal Protection Clause
20 is to identify the classification that it draws." *Coal. for Econ. Equity v. Wilson*, 122 F.3d
21 692, 702 (9th Cir. 1997). The classification will help the Court determine whether

22
23 ¹⁰ Defendant Arizona argues that the injunction should be limited to the named
24 plaintiffs. Doc. 60 at 17 (citing *Zepeda v. INA*, 753 F.2d 719 (9th Cir. 1983)). The Ninth
25 Circuit has held that a preliminary injunction should be limited to individual plaintiffs
26 unless the court has certified a class. *Zepeda*, 753 F.2d at 727. The Ninth Circuit has
27 also held, however, that an injunction is not overbroad because it extends benefits to
28 persons other than those before the Court "if such breadth is necessary to give prevailing
parties the relief to which they are entitled." *Easyriders Freedom F.I.G.H.T. v.
Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996). Because Puente seeks relief on behalf
of all its members, the Court concludes that the preliminary injunction should apply to
the identity theft laws generally. As in *Easyriders*, requiring law enforcement officials to
distinguish between unauthorized aliens who are members of Puente and those who are
not would be impractical, and a less than complete preliminary injunction would
therefore likely deny Puente the complete relief to which it is entitled. *Id.* at 1502.

1 “members of a certain group [are] being treated differently from other persons based on
2 membership in that group.” *United States v. Lopez-Flores*, 63 F.3d 1468, 1472 (9th Cir.
3 1995). “Second, if it is demonstrated that a cognizable class is treated differently, the
4 court must analyze under the appropriate level of scrutiny whether the distinction made
5 between the groups is justified.” *Id.* (citing *Plyer v. Doe*, 457 U.S. 202, 217-18 (1982)).

6 **1. Classification.**

7 A court may determine a law’s classifications by how the law discriminates (*i.e.*,
8 differentiates) between groups. A law may discriminate against a group of people in one
9 of three ways. First, the law may discriminate on its face, that is, by its explicit terms.
10 *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967). Second, the law, although neutral on its
11 face, may be administered in a discriminatory way. *See, e.g., Yick Wo v. Hopkins*, 118
12 U.S. 356 (1886). Third, the law, although neutral on its face and applied in accordance
13 with its terms, may have been enacted with a purpose of discriminating. *See, e.g., Hunter*
14 *v. Underwood*, 471 U.S. 222 (1985).

15 Plaintiffs argue that the identity theft laws were enacted with a purpose of
16 discriminating. *See* Doc. 83 at 27-30. Specifically, they argue that the identity theft laws
17 discriminate against unauthorized aliens by penalizing conduct in which unauthorized
18 aliens are more likely to engage. *Id.* at 27. In proving a discriminatory purpose, “[p]roof
19 of discriminatory intent is required to show that state action having a disparate impact
20 violates the Equal Protection Clause.” *McLean v. Crabtree*, 173 F.3d 1176, 1185 (9th
21 Cir. 1999) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252,
22 265 (1977)). Plaintiffs must show that the State “selected or reaffirmed a particular
23 course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects
24 upon an identifiable group.” *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279
25 (1979). The Court may consider various sources of evidence in determining whether a
26 law was adopted “because of” its adverse effects on a group. *Arlington Heights*, 429 U.S.
27 at 264-68. “The historical background of the [law] is one evidentiary source, particularly
28 if it reveals a series of official actions taken for invidious purposes.” *Id.* at 267. “The

1 legislative or administrative history [also] may be highly relevant, especially where there
2 are contemporary statements by members of the decisionmaking body, minutes of its
3 meetings, or reports.” *Id.* at 268.

4 Plaintiffs allegations, which must be taken as true in ruling on the motion to
5 dismiss, make a plausible claim that the identity theft laws were adopted “because of”
6 their adverse effects on unauthorized aliens. Plaintiffs allege that unauthorized aliens are
7 more likely than other people to use the “personal identifying information” of another to
8 “obtain or continue employment.” A.R.S. § 13-2008; *see* Doc. 83 at 27. Because of this,
9 Plaintiffs argue, there is no other group of employees as uniformly disadvantaged by the
10 identify theft statutes as unauthorized aliens. *See* Doc. 23, ¶¶ 97-98, 101-05, 126-27
11 (alleging that Defendants systematically enforce the identity theft laws against
12 unauthorized aliens). “[W]hen the adverse consequences of a law upon an identifiable
13 group are [inevitable], a strong inference that the adverse effects were desired can
14 reasonably be drawn.” *Feeney*, 442 U.S. at 279 n.25.¹¹

15 Plaintiffs also allege discriminatory intent. The historical background of the
16 identity theft laws shows that the Arizona Legislature was passing numerous bills
17 directed at problems associated with unauthorized aliens. Doc. 23, ¶¶ 35-50. The
18 legislative history indicates that the legislature hoped the identity theft laws would
19 encourage unauthorized aliens to leave the country. *See* Doc. 23, ¶¶ 38-39, 55-64
20 (alleging that the identity theft laws were passed as part of a strategy of “attrition through
21 enforcement” towards unauthorized aliens). Plaintiffs plausibly allege that the identity
22 theft laws were passed with a purpose of discriminating against unauthorized aliens.¹²

23
24 ¹¹ In their reply brief, Defendants argue that Plaintiffs have failed to allege
25 sufficient facts to assert disparate impact and discriminatory purpose. Doc. 118 at 5-10.
26 Defendants also point to legislative history that shows a lack of discriminatory purpose.
27 *Id.* In so arguing, Defendants mistake the appropriate standard for a motion to dismiss.
When analyzing a complaint for failure to state a claim under Rule 12(b)(6), the well-
pleaded factual allegations are taken as true and construed in the light most favorable to the
nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Here,
Plaintiffs have alleged sufficient facts in support of their equal protection claim.

28 ¹² Numerous Ninth Circuit cases state that “[o]nce the plaintiff establishes
governmental classification, it is necessary to identify a ‘similarly situated class’ against

1 **2. Level of Scrutiny.**

2 The level of scrutiny applied in an equal protection analysis depends on the
 3 classification at issue. If a law classifies on the basis of race or alienage, the law must
 4 satisfy strict scrutiny by a showing that the classification is necessary to achieve a
 5 compelling government purpose. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429, 432-33
 6 (1984). If a law classifies on the basis of gender or legitimacy, the law must satisfy
 7 intermediate scrutiny by a showing that classification has a substantial relationship to an
 8 important government purpose. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533
 9 (1996). For all other classifications, a law must satisfy rational basis review by a
 10 showing that the classification is rationally related to a legitimate government purpose.
 11 *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988). Plaintiffs argue that either a
 12 “heightened scrutiny” or a rigorous rational basis review should apply. Doc. 83 at 30-34.
 13 These are standards of review that do not fit neatly within the traditional categories.

14 **a. Heightened Scrutiny.**

15 Plaintiffs initially argue that some form of “heightened scrutiny” should apply.
 16 Doc. 83 at 30. Relying on *Plyer v. Doe*, 457 U.S. 202 (1982), they argue that the Court
 17 should assess whether the identity theft laws further a substantial or important state
 18 interest. Doc. 83 at 31. While “states must generally treat *lawfully* present aliens the

19 _____
 20 which the plaintiff’s class can be compared.” *Rosenbaum v. City & Cnty. of San*
 21 *Francisco*, 484 F.3d 1142, 1153 (9th Cir. 2007) (quoting *Freeman v. City of Santa Ana*,
 22 68 F.3d 1180, 1187 (9th Cir. 1995)). Plaintiffs have not identified a similarly situated
 23 class and Defendants argue that this is a threshold requirement. *See* Doc. 118 at 4. The
 24 Court concludes that the requirement of identifying a “similarly situated class” is a
 25 threshold requirement in only a minority of as-applied equal protection cases. *See, e.g.,*
 26 *Rosenbaum*, 484 F.3d at 1153 (as-applied challenge to a noise ordinance); *United States*
 27 *v. Arenas-Ortiz*, 339 F.3d 1066, 1068-69 (9th Cir. 2003) (as-applied selective prosecution
 28 claim); *Freeman*, 68 F.3d at 1187 (as-applied challenge to police practices). Otherwise,
 the “similarly situated” requirement is simply a restatement of core Equal Protection
 concerns, namely, that “all persons similarly circumstanced shall be treated alike.”
Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster guano Co. v. Virginia*, 253
 U.S. 412, 415 (1920)). In many cases involving an equal protection challenge to a statute
 based on its discriminatory purpose, the Supreme Court has not discussed or applied the
 “similarly situated” requirement. *See, e.g., Feeney*, 442 U.S. at 256; *Arlington Heights*,
 429 U.S. at 252; *see also* Giovanna Shay, *Similarly Situated*, 18 Geo. Mason L. Rev.
 581, 598 (2011) (noting that the ‘similarly situated’ requirement “has never been viewed
 by the U.S. Supreme Court as a threshold hurdle to obtaining equal protection review on
 the merits”).

1 same as citizens, and state classifications based on alienage are subject to strict scrutiny
2 review,” *Korab v. Fink*, 748 F.3d 875, 881 (9th Cir. 2014) (emphasis added) (citing *In re*
3 *Griffiths*, 413 U.S. 717, 719-22 (1973)), the same is not true for unauthorized aliens.
4 “Undocumented aliens cannot be treated as a suspect class because their presence in this
5 country in violation of federal law is not a ‘constitutional irrelevancy.’” *Plyler*, 457 U.S.
6 at 223. *Plyler* considered the constitutionality of a Texas law that denied undocumented
7 alien children a free public school education. *Id.* at 205. The Court explained that
8 “undocumented status is not irrelevant to any proper legislative goal. Nor is
9 undocumented status an absolutely immutable characteristic since it is the product of
10 conscious, indeed unlawful action.” *Id.* at 220. The Court ultimately applied a form of
11 rational basis review to the law, finding that the law could not “be considered rational
12 unless it furthers some substantial goal of the State.” *Id.* at 224.

13 This language of furthering “some substantial goal” is different from traditional
14 rational basis review, under which a court “will uphold the legislative classification so
15 long as it bears a rational relationship to some legitimate end.” *Romer v. Evans*, 517 U.S.
16 620, 631 (1996). Plaintiffs argue that this “substantial goal” test should apply here. The
17 Court disagrees. *Plyler*’s holding was expressly grounded on the unique vulnerability of
18 children and the importance of education. The Court emphasized that the Texas law was
19 “directed against children, and imposes its discriminatory burden on the basis of a legal
20 characteristic over which children can have little control.” *Plyler*, 457 U.S. at 220. The
21 Court contrasted this with the situation of adult unauthorized aliens, whose presence is
22 “the product of conscious, indeed unlawful, action.” *Id.* Because the present case does
23 not involve children and public education, the Court finds that a heightened scrutiny is
24 not appropriate.

25 **b. Rigorous Rational Basis Review.**

26 Alternatively, Plaintiffs argue that a more “active” form of rational basis review is
27 required because the identity theft laws are motivated by animus or the desire to punish a
28 politically unpopular group. *See* Doc. 83 at 31. Ordinarily, courts apply rational basis

1 review in a highly deferential manner, upholding the challenged law “if there is any
2 reasonably conceivable state of facts that could provide a rational basis for the
3 classification.” *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *FCC v. Beach*
4 *Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)). This approach reflects “deference to
5 legislative policy decisions” and a reluctance of courts “to judge the wisdom, fairness,
6 logic or desirability of those choices.” *LeClerc v. Webb*, 419 F.3d 405, 421 (5th Cir.
7 2005). But “even the standard of rationality . . . must find some footing in the realities of
8 the subject addressed by the legislation.” *Heller*, 509 U.S. at 321 (1993).

9 Some cases, however, have applied a more rigorous form of rational basis review.
10 *See, e.g., United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S.
11 620 (1996); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *U.S. Dep’t of*
12 *Agric. v. Moreno*, 413 U.S. 528 (1973); *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011).
13 These cases involve laws motivated by “an improper animus” towards a politically
14 unpopular group. *See, e.g., Windsor*, 133 S. Ct. at 2693. When a law disadvantages an
15 unpopular group, there arises an “inference that the disadvantage imposed is born of
16 animosity toward the class of persons affected.” *Romer*, 517 U.S. at 634. This inference
17 cannot be overcome by any conceivable rational basis for the law. *See Cleburne*, 473
18 U.S. at 447-50. Rather, the state must demonstrate that the actual reason for the law was
19 not a desire to discriminate. *See Romer*, 517 U.S. at 634. If a court finds that the only
20 actual reason for the law is a desire to discriminate, the court will invalidate the law,
21 relying on the maxim that “a bare congressional desire to harm a politically unpopular
22 group cannot constitute a legitimate governmental interest.” *Moreno*, 413 U.S. at 534;
23 *see also Windsor*, 133 S. Ct. at 2693 (finding that laws may not exist to “impose a
24 disadvantage, a separate status, and so a stigma upon” those of a particular class).

25 Plaintiffs allege that the identity theft laws are animated by an improper animus
26 towards unauthorized aliens. Plaintiffs cite numerous statements by legislators that
27 allegedly show hostility towards this group. *See, e.g., Doc. 23*, ¶ 56 (state representative
28 urging members not to stand back “while we wait the destruction of our country” and

1 “the destruction of neighborhoods” by illegal aliens); ¶ 64 (state senator saying he wanted
2 to make sure workers would be charged with a serious enough crime to guarantee they
3 “stay in jail” while the case is pending and then be immediately deported). Plaintiffs
4 allege that unauthorized aliens are a politically unpopular group that has been subjected
5 to frequent discrimination in Arizona.

6 The Court is unsure whether rigorous rational basis review applies to this case.
7 The cases applying rigorous rational basis review involved the denial of government
8 benefits, not the imposition of criminal penalties for clearly criminal conduct. *See, e.g.,*
9 *Windsor*, 133 S. Ct. at 2683 (surviving spouse of same-sex couple challenged a denial of
10 the spousal deduction tax benefit); *Cleburne*, 473 U.S. at 435-36 (challenge to a zoning
11 ordinance requiring a special use permit for houses for the mentally retarded); *Moreno*,
12 413 U.S. at 529-30 (challenge to a Food Stamp Act amendment that rendered ineligible
13 for certain benefits households containing unrelated persons). In addition, those cases
14 involved laws that disadvantaged otherwise law-abiding citizens, not persons who are
15 unlawfully present in the country and engaged in fraudulent activity. Because the case
16 law requires a more rigorous review when an improper animus is alleged, Plaintiffs have
17 alleged that the identity theft laws are the fruit of animus towards unauthorized aliens,
18 and this issue may be more fully illuminated at the summary judgment stage, the Court
19 will assume for purposes of the motion to dismiss that rigorous rational basis review
20 applies.¹³

21 3. Application.

22 Plaintiffs claim that the only actual reason for the identity theft laws was to punish
23 or harm a politically unpopular group – unauthorized aliens. *See* Doc. 83 at 31-34. They

24
25 ¹³ The Court finds rigorous rational basis review to be problematic. The rational
26 basis test has long been viewed as reflecting the deference courts should afford to the
27 policy-making branches of government. The Court also finds this more rigorous rational
28 basis review, with its lack of guiding principles, to be dangerously susceptible to
invoking a judge’s own policy preferences. These concerns notwithstanding, the Supreme
Court and Ninth Circuit plainly have applied a more active rational basis review in some
cases, and those cases constitute precedent binding on this Court. *See Ariz. Dream Act*
Coal. v. Brewer, 945 F. Supp. 2d 1049, 1069 (D. Ariz. 2013), *rev’d on other grounds*,
757 F.3d 1053 (9th Cir. 2014).

1 also argue that the identity theft laws “were not intended to address identifiable criminal
2 harms separate from the immigration issue.” Doc. 83 at 34; *see* Doc. 23, ¶ 65. Courts
3 have been reluctant to find that facially neutral criminal laws violate the Equal Protection
4 Clause. For example, numerous cases have rejected the argument that the stark
5 difference in punishment for crack cocaine offenses and simple powder cocaine offenses
6 violates equal protection. *See United States v. Singleterry*, 29 F.3d 733, 740-41 (1st Cir.
7 1994); *United States v. Thompson*, 27 F.3d 671, 678 (D.C. Cir. 1994) (collecting cases);
8 *United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993). Plaintiffs in those cases argued
9 that the difference was irrational and had a disparate impact on African-Americans, who
10 are more likely to use crack cocaine than Caucasians. *See Singleterry*, 29 F.3d at 740-41.

11 Here also, Plaintiffs argue that criminalizing the act of identity theft done “with
12 the intent to obtain or continue employment” will have a disparate impact on
13 unauthorized aliens. The difference, however, is that Plaintiffs have alleged that the
14 Arizona Legislature *intended* the disparate impact on unauthorized aliens, an allegation
15 that must be taken as true at this stage of the litigation. And the Court assumes for
16 purposes of this motion that a more rigorous rational basis review will apply – more
17 rigorous than the crack cocaine cases. *See, e.g., United States v. Cyrus*, 890 F.2d 1245,
18 1248 (D.C. Cir. 1989). Applying this standard of review, the Court cannot conclude that
19 Plaintiffs’ equal protection claim should be dismissed for failure to state a claim. *See*
20 *Moreno*, 413 U.S. at 534.

21 Defendant Montgomery argues that he does not apply the identity theft laws in a
22 discriminatory manner and his actions therefore do not deny equal protection. Doc. 55 at
23 21-22. This argument misses the point. Plaintiffs attack the laws he is applying, not his
24 office’s prosecutorial decisions. If the identity theft laws are facially invalid because they
25 deny equal protection, the Court may enjoin him from enforcing those laws. The Court,
26 therefore, denies Defendants’ motions to dismiss Plaintiffs’ equal protection claim.¹⁴

27
28 ¹⁴ Defendant Arpaio argues that Plaintiffs have failed to state a claim under 42
U.S.C. § 1983. *See* Doc. 53 at 12-13. To state a claim under § 1983, Plaintiffs must
plausibly claim that Defendants (1) acted under the color of state law (2) to deprive

1 **B. Maricopa County’s Liability Under § 1983.**

2 Defendants argue that Maricopa County is not a proper defendant under § 1983
3 because (1) Sheriff Arpaio and County Attorney Montgomery are not final policymakers
4 for the County; (2) the County does not enforce the identity theft laws; and (3) Maricopa
5 County would be unable to legally comply with any injunctive relief the Court might
6 grant. Doc. 55 at 13-18. Plaintiffs counter that Maricopa County is liable because
7 Sheriff Arpaio is a final policymaker and the County finances the enforcement of the
8 identity theft laws through tax revenues. Doc. 83 at 23-25.

9 Under *Monell v. Dep’t of Soc. Servs. of New York*, 436 U.S. 658, 691-94 (1978),
10 municipal liability attaches when a plaintiff’s alleged constitutional deprivation was the
11 product of a policy or custom of the local government. *See also Fogel v. Collins*, 531
12 F.3d 824, 834 (9th Cir. 2008). “For purposes of liability under *Monell*, a policy is a
13 deliberate choice to follow a course of action . . . made from among various alternatives
14 by the official or officials responsible for establishing final policy with respect to the
15 subject matter in question.” *Id.* (quoting *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir.
16 2002) (per curiam)) (internal quotations omitted). A municipal policy may include the
17 decision to enforce a state law. *Evers v. Custer Cnty.*, 745 F.2d 1196, 1203-04 (9th Cir.
18 1984). Whether a state official is a final policy maker for purposes of municipal liability
19 is a question of state law. *See Streit v. County of Los Angeles*, 236 F.3d 552, 560 (9th
20 Cir. 2001). When determining whether an individual has final policymaking authority,
21 courts ask whether the individual at issue has authority “in a particular area, or on a
22 particular issue.” *McMillian v. Monroe County*, 520 U.S. 781, 785 (1997).

23 The Arizona Constitution creates the elected office of sheriff for each county and
24 provides that the sheriff’s duties and powers “shall be as prescribed by law.” Ariz. Const.
25 art. XII, §§ 3-4. Under A.R.S. § 11-441, the sheriff is empowered to “[a]rrest and take

26
27
28

Plaintiffs of a constitutional right. *Ewing v. City of Stockton*, 588 F.3d 1218, 1223 (9th
Cir. 2009). Based on the foregoing analysis, Plaintiffs have stated a claim under § 1983.
Plaintiffs have plausibly alleged that Defendants are enforcing a law that violates the
Equal Protection Clause.

1 before the nearest magistrate for examination all persons who attempt to commit or who
2 have committed a public offense.” *Id.* “The purpose of this duty is the prompt and
3 orderly administration of criminal justice, including the Sheriff’s discretionary
4 investigatory determination of when enough evidence has been obtained to make an
5 arrest.” *Guillory v. Greenlee Cnty.*, No. CV05-352-TUC-DCB, 2006 WL 2816600, at *4
6 (D. Ariz. Sept. 28, 2006). Under A.R.S. § 11-444, the local county is responsible for
7 paying the “actual and necessary expenses incurred by the sheriff in pursuit of criminals”
8 as well as additional expenses.

9 These provisions make Sheriff Arpaio a final policymaker for Maricopa County.
10 Unlike in *McMillian*, where the court found that the sheriff was a state but not a county
11 officer, Arizona law designates the sheriff as a county officer. *See McMillian*, 520 U.S.
12 at 788-89; *see also* A.R.S. § 11-401 (listing the sheriff as an officer of the county). The
13 Sheriff’s responsibility for criminal law enforcement makes him a person “whose edicts
14 or acts . . . may fairly be said to represent official policy[.]” *Monell*, 436 U.S. at 694.
15 Sheriff Arpaio’s decision to enforce the identity theft laws, therefore, makes Maricopa
16 County liable for that action. *See Evers*, 745 F.2d at 1203-04.

17 Defendants argue that Maricopa County’s lack of control over Sheriff Arpaio’s
18 law-enforcement decisions shows that he is not a final policymaker for the County. *See*
19 Doc. 118 at 16-19. But the Arizona Court of Appeals has held that the Sheriff is the final
20 policymaker for the County on matters of jail management, *Flanders v. Maricopa Cnty.*,
21 54 P.3d 837, 847 (Ariz. Ct. App. 2002), and the County has not explained, nor can the
22 Court discern, how the County has more control over the Sheriff’s jail-management
23 decisions than over his law-enforcement decisions. *Flanders* compels the conclusion that
24 Sheriff Arpaio is the final policymaker for the County on law-enforcement matters.
25 Furthermore, every district court to address this issue has held that Arizona counties are
26 liable for law-enforcement decisions of local sheriffs. *See United States v. Maricopa*
27 *Cnty.*, 915 F. Supp. 2d 1073, 1083-84 (D. Ariz. 2012); *Ortega Melendres v. Arpaio*, 598
28 F. Supp. 2d 1025, 1038-39 (D. Ariz. 2009); *Guillory*, 2006 WL 2816600, at *3-5.

1 Maricopa County argues that its presence in this case could result in it being
2 “bound by an injunction that is not within its authority to comply with under Arizona
3 law.” Doc. 55 at 17. The County emphasizes that Arizona law gives it no control over
4 criminal law enforcement. *Id.* at 14 (citing A.R.S. § 11-251). This fact might limit the
5 County’s exposure to contempt or other remedies if an injunction is disregarded, but it
6 does not alter the fact that the County is a proper defendant under *Monell*. Due to this
7 finding, the Court need not decide whether County Attorney Montgomery is also an
8 official policymaker for the County.

9 **C. Rule 8 and Motions to Strike.**

10 Defendants ask the Court to dismiss Plaintiffs’ complaint for failing to comply
11 with Rule 8. Doc. 53 at 17; Doc. 55 at 6-7. The rule requires that a complaint contain “a
12 short and plain statement of the claim,” and that each “allegation be simple, concise, and
13 direct.” Fed.R.Civ.P. 8(a)(2) & 8(d)(1). Defendants argue that the complaint violates the
14 rule because it “contains paragraph after paragraph of vague, conclusory and
15 disconnected allegations, unduly prejudicing [Defendants] by foreclosing reasonable
16 notice and fair opportunity to respond and raising the specter of unnecessary discovery.”
17 Doc. 55 at 7. The Court disagrees.

18 The Ninth Circuit has held that “verbosity or length is not by itself a basis for
19 dismissing a complaint based on Rule 8(a).” *Hearns v. San Bernardino Police Dept.*, 530
20 F.3d 1124, 1131 (9th Cir. 2008) (citations omitted); *but see Cafasso, U.S. ex rel. v. Gen.*
21 *Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1059 (9th Cir. 2011) (affirming dismissal of a
22 733-page complaint as prejudicial and showing bad faith). To qualify for dismissal, the
23 complaint must be so complex or confusing that a defendant could not readily discern the
24 allegations being made against him. *See, e.g., McHenry v. Renne*, 84 F.3d 1172, 1178
25 (9th Cir. 1996); *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981).

26 Plaintiffs’ complaint contains 34 pages and 192 paragraphs. The complaint may
27 be long, but it is not so complex or confusing that Defendants are unable to discern the
28 allegations made against them. From its beginning, the complaint makes clear that this

1 case is about the constitutionality of the identity theft laws under the Supremacy and
2 Equal Protection Clauses. Doc. 23, ¶ 5. The complaint delineates the parties and their
3 interests in the case. *Id.*, ¶¶ 9-16. It contains factual allegations that, although more
4 extensive than necessary, give substance to Plaintiffs' claims. *Id.*, ¶¶ 17-168. The
5 complaint also clearly states the requested forms of relief. *Id.*, ¶¶ 180-92. This is not a
6 case where "one cannot determine from the complaint who is being sued, for what relief,
7 and on what theory, with enough detail to guide discovery." *McHenry*, 84 F.3d at 1178.

8 Defendants have also move to strike numerous portions of the complaint. Doc. 53
9 at 18-25; Doc. 55 at 7-13. Under Rule 12(f), the "court may strike from a pleading an
10 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."
11 Fed. R. Civ. P. 12(f). Motions to strike are generally disfavored, as they involve a drastic
12 remedy and may be used as a "dilatatory or harassing tactic." 5C C. Wright, A. Miller, et
13 al., *Federal Practice & Procedure* § 1380 (3d ed.1998); *see also Torres v. Goddard*, No.
14 CV-06-2482-PHX-SMM, 2008 WL 1817994, at *1 (D. Ariz. Apr. 22, 2008).
15 Defendants argue that dozens of paragraphs from the complaint are infirm for a variety of
16 reasons. They argue that specified paragraphs contain argumentative and inflammatory
17 allegations, immaterial and impertinent legislative history, vague and confusing
18 statements, as well as other problems. Defendants essentially invite the Court to place
19 the complaint under a microscope and assess whether each statement is pertinent to this
20 case. The Court declines the invitation. A party's "assertions in its pleadings are not
21 evidence." *United States v. Zermeno*, 66 F.3d 1058, 1062 (9th Cir. 1995). The Court
22 will deny Defendants' motions to strike.¹⁵

23 **V. Motions to Supplement.**

24 Plaintiffs and Defendants have filed motions for leave to file supplemental
25 declarations, evidentiary records, responses, and surreplies. Docs. 84, 98, 103, 123.

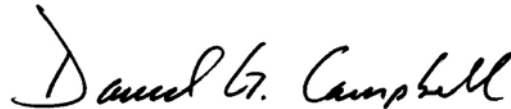
26
27 ¹⁵ As a separate argument, Defendant Arpaio asks the Court to strike paragraphs in
28 the complaint that contain allegations regarding the MCSO because the MCSO is a
"nonjural" entity. Doc. 53 at 16. The MCSO, however, is not named as a defendant in
the complaint. *See* Doc. 23. The allegations regarding the MCSO are relevant to
Plaintiffs' claims against Defendant Arpaio.

1 Given the accelerated nature of the proceedings in this case, the importance of the issues,
2 and the lack of opposition to the motions, the Court will grant the motions. The Court
3 has read and considered the supplemental documents in rendering its decision.

4 **IT IS ORDERED:**

- 5 1. Plaintiffs' motion for a preliminary injunction (Doc. 30) is **granted**. Until
6 further order of the Court, Defendants are enjoined from enforcing A.R.S. §
7 2009(A)(3) and the portion of A.R.S. § 13-2008(A) that addresses actions
8 committed "with the intent to obtain or continue employment."
9 2. Defendants' motions to dismiss and strike (Docs. 53, 55, 127) are **denied**.
10 3. Parties' motions to supplement (Docs. 84, 98, 103, 123) are **granted**.

11 Dated this 5th day of January, 2015.

12
13
14 

15 _____
16 David G. Campbell
17 United States District Judge
18
19
20
21
22
23
24
25
26
27
28