Anne Lai (admitted *pro hac vice*)
alai@law.uci.edu
Sameer Ashar (admitted *pro hac vice*)
sashar@law.uci.edu
University of California, Irvine School of Law – Immigrant Rights Clinic
P.O. Box 5479
Irvine, CA 92616-5479
Telephone: (949) 824-9894
Facsimile: (949) 824-2747

Daniel J. Pochoda (SBA No. 021979)
dpochoda@acluaz.org
ACLU Foundation of Arizona
3707 N. 7th St., Ste. 235
Phoenix, AZ 85014
Telephone: (602) 650-1854

Jessica Karp Bansal (admitted *pro hac vice*)
jkarp@ndlon.org
National Day Laborer Organizing Network
675 S. Park View Street, Suite B
Los Angeles, California 90057
Telephone: (213) 380-2214

Ray A. Ybarra Maldonado (SBA No. 027076)
rybarra@stanfordalumni.org
Law Office of Ray A. Ybarra Maldonado, PLC
2637 North 16th Street, Unit 1
Phoenix, AZ 85006
Telephone: (602) 910-4040

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Puente Arizona, et al.,

Plaintiffs,

v.

Joseph M. Arpaio, et al.,

Defendants.

Case No. 2:14-cv-01356-DGC

LODGED: PROPOSED PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT ATTACHED

(ORAL ARGUMENT REQUESTED)

Anne Lai (admitted *pro hac vice*)
alai@law.uci.edu
Sameer Ashar (admitted *pro hac vice*)
sashar@law.uci.edu
University of California, Irvine School
of Law – Immigrant Rights Clinic
P.O. Box 5479
Irvine, CA 92616-5479
Telephone: (949) 824-9894
Facsimile: (949) 824-2747

Daniel J. Pochoda (SBA No. 021979)
dpochoda@acluaz.org
ACLU Foundation of Arizona
3707 N. 7th St., Ste. 235
Phoenix, AZ 85014
Telephone: (602) 650-1854

Jessica Karp Bansal (admitted *pro hac vice*)
jkarp@ndlon.org
National Day Laborer Organizing Network
675 S. Park View Street, Suite B
Los Angeles, California 90057
Telephone: (213) 380-2214

Ray A. Ybarra Maldonado (SBA No. 027076)
rybarra@stanfordalumni.org
Law Office of Ray A. Ybarra Maldonado, PLC
2637 North 16th Street, Unit 1
Phoenix, AZ 85006
Telephone: (602) 910-4040

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Puente Arizona, et al.,

Plaintiffs,

v.

Joseph M. Arpaio, et al.,

Defendants.

Case No. 2:14-cv-01356-DGC

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

(ORAL ARGUMENT REQUESTED)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

MOTION 1

MEMORANDUM OF POINTS AND AUTHORITIES 1

I. INTRODUCTION 1

II. BACKGROUND 2

A. Federal Law Regulating Employment of Undocumented Immigrants 2

B. Arizona Law Regulating Employment of Undocumented Immigrants 6

III. ARGUMENT 10

A. Plaintiffs are Likely to Succeed on the Merits of Their Supremacy Clause Claim Because Arizona's Worker Identity Provisions are Preempted 10

a). Congress has occupied the field of regulation of employment of undocumented immigrants 11

b) Congress's occupation of the field of regulation of employment of undocumented immigrants includes regulation of fraud in the federal employment verification system 12

c) Arizona's worker identity provisions are preempted because they intrude on the field of employment of undocumented immigrants and the regulation of fraud in the federal employment verification system. 17

B. Plaintiffs Puente and Rev. Frederick-Gray Are Suffering and Will Continue to Suffer Irreparable Harm Absent a Preliminary Injunction 21

C. The Balance of Equities and Hardships Tips Sharply in Plaintiffs' Favor 24

D. An Injunction is in the Public Interest 25

IV. CONCLUSION 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011)................10, 24

Arc of California v. Douglas, __ F.3d __, 2014 WL 2922662 (9th Cir. June 30, 2014) 10

Arizona Dream Act Coalition v. Brewer, __ F.3d__ , 2014 WL 3029759 (9th Cir. July 7, 2014)....................22

Arizona v. United States, 132 S.Ct. 2492 (2012) ....passim

Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999)....................22

Buckman Co. v. Plaintiff's Legal Committee, 531 U.S. 341 (2001) 17, 19

Cal. Pharmacists Ass'n v. Maxwell–Jolly, 563 F.3d 847 (9th Cir. 2009). 24

Chamber of Commerce v. Whiting, 131 S.Ct. 1968 (2011) 7

Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009)....................23

Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000). 10, 21

De Canas v. Bica, 424 U.S. 351 (1976). 15

Elrod v. Burns, 427 U.S. 347 (1976)....................22

Frothingham v. Mellon, 262 U.S. 44 (1923)....................24

Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) 10, 12

Georgia Latino Alliance for Human Rights v. Governor of Georgia [“*GLAHR*”], 691 F.3d 1250 (11th Cir. 2012)....................15, 16, 17, 23

GoTo.com, Inc. v. Walt Disney, Co. 202 F.3d 1199 (9th Cir. 2000)....................22

Grand Canyon Trust v. Williams, 2013 WL 4804484(D. Ariz. 2013)....................24

Harris v. Bd. of Sup'rs, 366 F.3d 754 (9th Cir. 2004) 22

Hines v. Davidowitz, 312 U.S. 52 (1941)....................11, 18, 20

Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) 3, 12, 16

INS v. Nat'l Center for Immigrants' Rights, Inc., 502 U.S. 183 (1991)....................3

Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013) 15, 16

Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873 (9th Cir. 2009)....................22

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)....................23

NAACP v. Alabama, 357 U.S. 449 (1958) 22

Ortega Melendres v. Arpaio, 695 F.3d 990 (9th Cir. 2012) 22

Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009) 25

Tayyari v. New Mexico State Univ., 495 F. Supp. 1365 (D.N.M. 1980) 18

United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544 (1996) 22

United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012) 19

United States v. Arizona, 641 F.3d 339 (9th Cir. 2011) .... passim

United States v. South Carolina, 720 F.3d 518 (4th Cir. 2013) 15, 16, 17, 20

United States v. South Carolina, 840 F. Supp. 2d 898 (D.S.C. 2011) 19

Valle del Sol v. Whiting, 732 F.3d 1006 (2013) .... passim

We Are America v. Maricopa County Bd. of Sup'rs, 297 F.R.D. 373 (D. Ariz. 2013) 16, 24

White Tanks Concerned Citizens, Inc. v. Strock, 563 F.3d 1033 (9th Cir. 2009) 22, 23

Wisconsin Dept. of Industry v. Gould, 475 U.S. 282 (1986) 12, 18

Wyeth v. Levine, 555 U.S. 555 (2009) 17

Statutes

8 U.S.C. § 1101 5

8 U.S.C. § 1182 .... 14, 16

8 U.S.C. § 1227 .... 14, 16

8 U.S.C. §1229 .... 19, 22

8 U.S.C. § 1324a 3, 13, 14, 16, 19

8 U.S.C. § 1324b 16

8 U.S.C. § 1324c 13, 14, 15, 16, 19

18 U.S.C. § 1546 .... 13, 14, 15

18 U.S.C. § 3231 19

A.R.S. § 13-2008(A) .... passim

A.R.S. § 13-2009(A)(3) .... passim

A.R.S. § 13-2928(C) 12

Pub. L. 99-603, § 101 .... 3, 13

Pub. L. 99-603, § 103 (1986). 13

Pub. L. 99-603, § 111(d) 5

Other Authorities

132 Cong. Rec. S16, 879–01 (1986) 4, 13

1986 U.S.C.C.A.N. 5856-1, 5856-1 12

Andorra Bruno, Cong. Research Serv., RL 40002 Immigration-Related Worksite Enforcement: Performance Measures 2-4 (2013) 4, 5, 22

H.R. Rep. No. 99–682 (1986) 5

Jorge F. Perez-Lopez, *Implementation of the North American Agreement on Labor Cooperation: A Perspective from the Signatory Countries*, 1 NAFTA: L. & Bus. Rev. Am. 3 (1995). 6

Letter from Janet Napolitano to Jim Weiers (July 2, 2007) 7

North American Agreement on Labor Cooperation, Annex 1 § 11 6

John Morton, Memorandum, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, ICE (June 17, 2011), ... 6

Regulations

8 C.F.R. § 274a.2. .... 3, 14

28 C.F.R. § 68.1 16

MOTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs move for a preliminary injunction to enjoin Defendants from enforcing A.R.S. §§ 13-2009(A)(3) and the portion of A.R.S. § 13-2008(A) that addresses actions committed "with the intent to obtain or continue employment." This motion is supported by the following Memorandum of Points and Authorities, the declarations of Carlos Garcia, Sara Cervantes Arreola, Noemi Romero, Rev. Susan E. Frederick-Gray and Nicolas de la Fuente, all documents on file in this action, and any further arguments presented.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs bring this motion to preliminarily enjoin Defendants from enforcing A.R.S. § 13-2009(A)(3) and the portion of A.R.S. § 13-2008(A) that addresses actions committed "with the intent to obtain or continue employment."[1] Arizona passed these provisions as part of a broader platform of legislation designed to make life so difficult for immigrant residents of the state that they would "self deport." Like other aspects of Arizona's self-deportation scheme that have been found unconstitutional, *see Arizona v. United States*, 132 S.Ct. 2492, 2510 (2012), the challenged provisions constitute a facially invalid state intrusion into an area of exclusive federal control. Further, they disrupt a carefully aligned federal scheme of regulation of immigration and employment by undermining federal efforts to balance prohibitions on employment of undocumented immigrants with other important interests, such as protecting the rights of undocumented workers.[2]

Absent court intervention, members of organizational Plaintiff Puente Arizona

[1] Plaintiffs recently filed an Amended Complaint. The amendments to the Complaint do not affect Plaintiffs request for a preliminary injunction, and for purposes of this Motion Plaintiffs treat the Amended Complaint as the operative one.

[2] Plaintiffs use the terms "undocumented worker" and "undocumented immigrant" to refer to individuals who do not have federal authorization to work in the United States. However, where materials quoted by Plaintiffs use a different term—such as "illegal immigrants," "illegal aliens," "aliens" and "illegals"— Plaintiffs will use that terminology for purposes of faithfully reproducing the quote.

("Puente") face imminent arrest and prosecution under the challenged provisions, and ongoing fear and distress. Arrest would result in emotional and mental harm and likely render Puente members ineligible for future immigration relief. Puente also faces irreparable harms to its organizational mission. Finally, Plaintiff Rev. Susan E. Frederick-Gray faces irreparable harm as a municipal taxpayer whose taxes are being used to enforce unconstitutional laws.

II. BACKGROUND

In 2007 and 2008, Arizona amended its identity theft laws to target undocumented immigrants for using false identity information "to obtain employment." A.R.S. § 13-2009(A)(3); *see also* A.R.S. § 13-2008(A). Specifically, House Bill 2779, also called the "Legal Arizona Workers Act," passed in 2007, created a new offense of aggravated identity theft to use the information of "another person, including a real or fictitious person, with the intent to obtain employment." *See* Pochoda Dec., Ex. 1, Arizona House Bill 2779 (2007) ("H.B. 2779"), § 1 (adding A.R.S. § 13-2009(A)(3)). House Bill 2745, passed in 2008, supplemented the Legal Arizona Workers Act by defining the offense of identity theft to include use of the information of another person, real or fictitious, "with the intent to obtain or continue employment." *See* Pochoda Dec., Ex. 2, Arizona House Bill 2745 (2008) ("H.B. 2745"), § 1 (amending A.R.S. § 13- 2008(A)). These provisions—A.R.S. § 13-2009(A)(3) and the portion of A.R.S. § 13-2008(A) that addresses actions committed "with the intent to obtain or continue employment" (collectively, the "worker identity provisions")—created a state scheme for regulating the employment of undocumented workers, including their use of false information to obtain work, that is at odds with the federal scheme. For the past six years, Defendants Maricopa County Sheriff's Office ("MCSO") and Maricopa County Attorney's Office ("MCAO") have used this state scheme to carry out a campaign of workplace raids and prosecutions, inflicting grave harm on Plaintiffs and Arizona's immigrant community.

A. Federal Law Regulating Employment of Undocumented Immigrants

"Federal governance of immigration and alien status is extensive and complex."

Arizona v. United States, 132 S.Ct. 2492, 2499 (2012). In 1986, Congress "made combating the employment of illegal aliens in the United States central to the policy of immigration law" when it passed the Immigration Reform and Control Act ("IRCA").[3] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (quoting *INS v. Nat'l Center for Immigrants' Rights, Inc*., 502 U.S. 183, 194 & n. 8 (1991)). IRCA reflects Congress's view that regulation of the employment of undocumented immigrants is integral to the regulation of immigration itself. *See* S. Rep. 99–132, 99th Cong., 1st Sess. 1 (1985) ("The primary incentive for illegal immigration is the availability of U.S employment").

IRCA established "a comprehensive framework" for regulating the employment of undocumented immigrants. *Arizona*, 132 S.Ct. at 2504. This framework includes a detailed procedure for verifying prospective employees' eligibility for employment, Pub. L. 99-603, § 101 (adding 8 U.S.C. § 1324a(a)(1)(B)),[4] and a graduated series of civil and criminal sanctions on employers for the knowing employment of undocumented immigrants. *Id.* (adding 8 U.S.C. §§ 1324a(e), (f))."IRCA is a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected." *Nat'l Ctr. for Immigrants' Rights*, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183; *see also Arizona*, 132 S.Ct. at 2505 (IRCA is the product of a "careful balance struck by Congress").

Key to IRCA's balance is a view that undocumented workers should not be treated as severely as the employers that hire them. "IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives." *Arizona*, 632 S.Ct. at 2504.

---

[3] Pub. L. 99-603, codified at 8 U.S.C. § 1324a *et seq*.

[4] This procedure involves the inspection of documents to confirm identity and employment eligibility and completion of a Form I-9, Employment Eligibility Verification Form. *See* 8 U.S.C. § 1324a(b), 8 C.F.R. § 274a.2.

1 Thus, IRCA "deliberate[ly]" does not impose criminal penalties on immigrants for
2 engaging in unauthorized employment. *Id.*
3 Congress anticipated that some might respond to the new system by using false
4 documents. *See The Knowing Employment of Illegal Immigrants*: Hearing before the
5 Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary, 97th
6 Cong. 5 (1981) ("Undoubtedly, there will be a significant increase in the use of
7 fraudulent documentation by illegal aliens . . . to establish employment eligibility.")
8 (statement of Doris Meissner, Acting Comm'r, INS), *available at*
9 http://babel.hathitrust.org/cgi/pt?id=pst.000047041790;view=1up;seq=7. Accordingly,
10 Congress provided federal authorities with a variety of tools—including some criminal
11 penalties—to address this concern. *See* 132 Cong. Rec. S16,879–01 (1986) (statement of
12 Sen. Simpson, bill co-sponsor) (legislators "paid close attention to" the issue of document
13 fraud and "provide[d] for this reality" by creating civil and criminal penalties). These
14 tools are flexible and diverse. They include criminal sanctions, civil fines, and
15 immigration penalties. *See infra* Pt. III.A.1.b.i (describing federal scheme).
16 IRCA's regulations involving unauthorized employment are enforced by the
17 Department of Homeland Security's ("DHS") Immigration and Customs Enforcement
18 ("ICE") agency. *See* Andorra Bruno, Cong. Research Serv., RL 40002 Immigration-
19 Related Worksite Enforcement: Performance Measures 2-4 (2013) ["*CRS Report*"]. ICE
20 approaches worksite enforcement as part of a broader strategy to enforce the INA and
21 relies heavily on civil, rather than criminal, measures. *See id.* at 6-7 (between 2003 and
22 2012, ICE brought 20,631 administrative charges as compared to 5,131 criminal
23 charges). ICE "'prioritizes the criminal prosecution of *employers* who knowingly hire
24 undocumented workers, abuse and exploit their workers, engage in the smuggling or
25 trafficking of their alien workforce, or facilitate document or benefit fraud.'" *Id.* at 3
26 (internal quotation marks omitted) (emphasis added).
27 The flexibility of the federal scheme for regulating the use of false information in
28 the employment verification system is key to ICE's ability to further the "careful balance

struck by Congress" in enacting IRCA. *Arizona*, 132 S.Ct. at 2505. Congress was concerned about the impact of enforcement activities on the rights of vulnerable groups of citizens and non-citizens, including the labor rights of undocumented workers. *See Nat'l Ctr. for Immigrants' Rights*, 913 F.2d at 1365–69; H.R. Rep. No. 99-682, pt. 1, at 58 (1986) (IRCA is not intended to "undermine or diminish in any way labor protections in existing law, or limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights"). In fact, as part of IRCA, Congress authorized funds for the Department of Labor's ("DOL") Wage and Hour Division to strengthen enforcement of employment standards laws for undocumented workers. Pub. L. 99-603, § 111(d) (noting that doing so would help "remove the economic incentive for employers to exploit and use such aliens").

The federal government has taken numerous steps to protect undocumented workers' rights and ensure that enforcement of laws regulating employment of undocumented immigrants does not undermine federal labor law policies. The DOL "focuses a significant percentage of its enforcement resources on low-wage industries that employ large numbers of immigrant—and presumably large numbers of unauthorized—workers." *CRS Report*, at 1. Congress has made available visas for workers who fall victim to labor trafficking and other crimes to encourage them to cooperate with law enforcement. *See generally* 8 U.S.C. §§ 1101(a)(15)(T), 1101,(U). And because enforcement against undocumented workers "might impede [DOL's] ability to gain the trust of illegal aliens who may be the victims of labor violations and potential witnesses against employers," *CRS Report*, at 10 (internal quotation marks omitted), DOL and DHS have entered into a Memorandum of Understanding ("MOU") "to avoid conflicts in the worksite enforcement activities of DOL and DHS," *id.*,[5] and ICE has

[5] The MOU acknowledges that "effective enforcement of both labor- and immigration-related worksite laws requires that the enforcement process be insulated from inappropriate manipulation by other parties." *See* Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites, Dec. 7, 2011, *available at*

1 issued guidance stating it will exercise prosecutorial discretion not to deport individuals
2 who are engaged in "protected activity" to vindicate labor rights. *See* John Morton,
3 Memorandum, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, ICE
4 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-
5 communities/pdf/domestic-violence.pdf.
6 At the international level, the United Sates has entered into treaties to protect labor
7 rights, including those that extend to undocumented workers. For example, in 1994, the
8 United States signed the North American Agreement on Labor Cooperation ("NAALC")
9 with the Governments of Mexico and Canada to "[p]rovid[e] migrant workers in a Party's
10 territory with the same legal protection as the Party's nationals in respect of working
11 conditions." NAALC, Annex 1 § 11, *available at*
12 http://new.naalc.org/index.cfm?page=219; *see generally* Jorge F. Perez-Lopez,
13 *Implementation of the North American Agreement on Labor Cooperation: A Perspective*
14 *from the Signatory Countries*, 1 NAFTA: L. & Bus. Rev. Am. 3, 18 (1995). Thus, the
15 ability of the United States to protect the rights of undocumented workers has both
16 national and international implications.

17 **B. Arizona Law Regulating Employment of Undocumented Immigrants**

18 More than twenty years after Congress enacted IRCA, Arizona entered the field of
19 regulation of employment of undocumented immigrants by enacting H.B. 2779 and H.B.
20 2745. As described above, these bills, in relevant part, revised Arizona's identity theft
21 laws to target undocumented immigrants for using false identity information "to obtain
22 employment." A.R.S. § 13-2009(A)(3); *see also* A.R.S. § 13-2008(A). Both bills,
23 including the worker identity provisions challenged here, were intended to generally
24 address unauthorized immigration and specifically address the employment of
25 undocumented immigrants.[6] Legislators plainly acknowledged this purpose. *See, e.g.*,

26

http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf.

27 [6] Other provisions of H.B. 2779 and H.B. 2745 required employers to check the
employment authorization status of employees and imposed sanctions in the form of
28 license suspensions on employers found to have knowingly employed unauthorized
immigrants. The sanctions on employers later were found permissible under an express

Pochoda Dec., Ex. 3, Senate Research, Amended Fact Sheet for H.B. 2779, S. 48, 1st Sess. (Ariz. 2007) (listing various Bill provisions to address "Employment of Unauthorized Aliens"); *id.*, Ex. 4, House Summary for H.B. 2745 prepared for Caucus and Committee of the Whole, H. 48, 2nd Sess. (Ariz. 2008) (noting that H.B. 2745 "makes numerous changes to the Legal Arizona Workers Act," including provisions regulating employment of unauthorized immigrants).

The chief sponsor of both H.B. 2779 and H.B. 2745 was then-Arizona House Representative Russell Pearce. *See id.*, Ex. 5, H.B. 2779, as introduced (listing sponsors); Ex. 6, H.B. 2745, as introduced (same). During debate on H.B. 2779, Pearce explained that he believed state action was necessary because "the feds have not done their job" to quell what he described as a "national epidemic" of unlawful immigration that threatened the "destruction of our country," and "[Arizona] need[s] to step up to the plate." *See id.*, Ex. 7, Hearing on H.B. 2779 Before the H. Comm. on Gov't, 48 Leg., 1st Sess., p. 2-4 (Ariz. 2007). Senator Chuck Gray explained he was supporting the Legal Arizona Workers Act because it "advances the cause of protecting our citizens against something that the federal government won't do." *See id.*, Ex. 8, Third Reading of Bills for H.B. 2779, 48 Leg., 1st Sess., p. 3 (Ariz. 2007). In signing H.B. 2779 into law, then-Governor Janet Napolitano wrote, "Immigration is a federal responsibility, but I signed House Bill 2779 because it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs." Letter from Janet Napolitano to Jim Weiers (July 2, 2007), *available at* http://www.azsos.gov/public_services/Chapter_Laws/2007/48th_Legislature_1st_Regular_Session/CH_279.pdf.

The worker identity provisions of H.B. 2779 and H.B. 2745 were conceived as part of "attrition through enforcement," a broader strategy on immigration advocated by Pearce and others. *See* Pochoda Dec., Ex. 7, *supra,* at p.5 (statement of Rep. Russell

---

savings clause in 8 U.S.C. § 1324. *See Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1973 (2011). There is no savings clause allowing states to impose penalties on employees.

Pearce that "attrition starts with enforcement"); *id*., Ex. 9, Pearce Email dated June 18, 2007 (identifying the "end[] [to] misuse of Social Security and IRS identification numbers, which illegal immigrants use to secure jobs" as one part of the attrition through enforcement strategy). The goal of attrition through enforcement is to make life so difficult for undocumented immigrants that they "deport themselves." *See* Ex. 9, *supra*; *see also United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) *rev'd on other grounds,* 132 S.Ct. 2492, (Noonan, J, concurring) (describing policy of attrition through enforcement in context of Arizona's S.B. 1070 law).

The statements of other Arizona legislators confirmed that they, too, envisioned the worker identity provisions as a means to facilitate the deportation of undocumented immigrants and provide a new mechanism for their arrest, jailing, and placement in deportation proceedings. *See* Ex. 10, Hearing on H.B. 2779 Before the S. Comm. of the Whole, 48 Leg., 1st Sess, at p. 6 (statement of Sen. Tom O'Halleran) (advocating that the worker identity provisions be harsh enough to guarantee that workers "stay in jail" while their cases are pending and then be immediately deported). Proponents of the bill were committed to ensuring that workers would receive a harsh penalty *because* the provisions had to do with the issue of unlawful immigration. *See, e.g.*, *id.* at p. 3 (statement of Sen. Robert Burns, H.B. 2779 co-sponsor) (acknowledging that the severity of the penalty could be a subject worthy of discussion but encouraging members not to engage in it because "this would be viewed as a weakening of our . . . opposition to illegal immigration").

In 2008, the MCSO began using the worker identity provisions to conduct worksite enforcement operations. These operations were part of a campaign by the Sheriff's Office to crack down on unlawful immigration. *See id.,* Ex. 11, MCSO Press Release dated Dec. 10, 2011. MCSO created a specialized unit within the agency to find and arrest undocumented immigrants, called the Human Smuggling Unit ("HSU"). *See* Pochoda Dec., Ex. 12, Dep. of Hector Martinez, at 11:3–19. One HSU squad, called the Criminal Employment Squad, focused on investigating those who use false documents to

work. *Id* at 11:9-13, 16:8-17:8. The MCAO prosecuted the cases through a special unit that prosecuted crimes related to immigration, rather than its Fraud and Identity Theft ("FITE") Bureau, which handles general identity theft cases. *Id.*, Ex. 13, Dep. of Vicki Kratovil, at 38:24–39:11, 44:23–45:14; *see also id.*, Ex. 14, Maricopa County Attorney's Office Special Report, at 8.

From 2008 to the present, MCSO has conducted over seventy worksite operations, arresting nearly 790 workers under A.R.S. § 13-2008(A) and 13-2009(A)(3). *Id.,* Ex. 15, MCSO Press Release dated June 13, 2014; *Id.,* Ex 16, MCSO Press Release dated Jan 22 2014. In the same period, only five employers in Maricopa County were charged with violations related to employing undocumented workers. *Id.*, Ex. 16, *supra*. MCSO's worksite operations have predictably spread fear throughout the County's immigrant community, discouraged undocumented workers from reporting labor rights violations, and devastated arrested workers and their family members. *See* Garcia Dec. at ¶¶ 13, 16, 18–19, 24–25; Romero Dec. at ¶¶ 14–15, 18, 22–26; Cervantes Dec. at ¶¶ 15–19, 24–29. Many undocumented members of organizational Plaintiff Puente Arizona worry constantly about being arrested in a raid. Garcia Dec. at ¶ 13. They work because they have no income source and must feed and care for their families. *Id.* at ¶ 13.

Maricopa County has spent and continues to spend municipal taxpayer funds in enforcing the worker identity provisions. In addition to the activities of the specialized units described above, the Jail Excise Tax funds the operation of the jails used to detain workers arrested under these statutes.[7] As recently as March 2014, Sheriff Arpaio announced: "I still enforce the illegal immigration laws by virtue of going into

---

[7] The Jail Excise Tax comes out of the sales tax charged in Maricopa County. *See* Maricopa County Department of Finance, Transaction Privilege Tax (TPT) Rate (Sales Tax), June 2013, *available at*, http://www.maricopa.gov/Finance/PDF/Financial%20Reporting/Publications/Cnty-StateSalesTax-June2013.pdf. It funds the "Detention Operations Fund," which is "used for the construction and operation of adult and juvenile detention facilities" in the County. *See* Department of Finance, Maricopa County, *Comprehensive Annual Financial Report: Maricopa County, Phoenix Arizona, For the Fiscal Year July 1, 2012 to June 30, 2013* 11 (2013), *available at* http://www.azauditor.gov/Reports/Counties/Maricopa/Financial_Audits/Countywide/FinancialAudit_June_30_2013/Maricopa_Cty_06_30_13_CAFR.pdf.

businesses and locking up the employees with fake ID." Statement of Sheriff Arpaio, Minnesota Tea Party Special Event, March 6, 2014, at minute 51:04, *available at* https://www.youtube.com/watch?v=LFd-Xxrl5qw.

III. ARGUMENT

Plaintiffs are entitled to a preliminary injunction. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Arc of California v. Douglas*, __ F.3d __, 2014 WL 2922662, at *5 (9th Cir. June 30, 2014) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)). The Ninth Circuit "evaluate[s] these factors via a 'sliding scale approach,' such that 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* Plaintiffs meet each element under either standard.

A. Plaintiffs are Likely to Succeed on the Merits of Their Supremacy Clause Claim Because Arizona's Worker Identity Provisions are Preempted[8]

"It is a fundamental principle of the Constitution [] that Congress has the power to preempt state law." *Valle del Sol v. Whiting*, 732 F.3d 1006, 1022 (2013) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). A state law may be expressly or impliedly preempted. In the absence of an express preemption provision, state law is preempted "when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in [] conflict with federal law." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 899 (2000) (internal citation and quotation marks omitted). Arizona's worker identity provisions are both field and conflict preempted.

1. *Arizona's Worker Identity Provisions are Field Preempted*

---

[8] In their Complaint, Plaintiffs also allege that Arizona's worker identity provisions violate the Equal Protection Clause of the Fourteenth Amendment. This Preliminary Injunction Motion is based only on Plaintiffs' Supremacy Clause claim.

Under field preemption, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona*, 132 S.Ct at 2501. "Field preemption can be 'inferred from a framework of regulation so pervasive . . . that Congress left no room for the States to supplement it or where there is a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Valle del Sol*, 732 F.3d at 1023 (quoting *Arizona*, 132 S.Ct at 2501). A field is preempted if "federal statutory directives provide a full set of standards . . . designed to function as a 'harmonious whole.'" *Arizona*, 132 S.Ct. at 2502 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 72 (1941)). "Where Congress occupies an entire field . . . *even complementary state regulation is impermissible*." *Id.* (emphasis added).

a) Congress has occupied the field of regulation of employment of undocumented immigrants

It is difficult to identify an area where the federal interest is more dominant than it is in immigration. "Federal control over immigration policy" is necessary because "'[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.'" *Valle del Sol*, 732 F.3d at 1006 (quoting *Arizona*, 132 U.S. at 2498). The federal government has "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 132 S.Ct. at 2498. This power is rooted in the Constitution's grant of authority to "establish a uniform Rule of Naturalization" and the federal government's "inherent power as a sovereign to control and conduct relations with foreign nations." *Id.*

As described above, in an exercise of this broad power, the federal government has created a pervasive framework of regulation governing immigration and the status of immigrants in the United States. *See supra*, Pt. II.A. This framework includes a "complex," *Arizona*, 641 F.3d at 358 "comprehensive," *Arizona*, 132 S.Ct. at 2504, and "careful[ly] balance[d]," *id.* at 2505, scheme to regulate the employment of

undocumented immigrants. This scheme is "central" to the larger structure of immigration policy, *Hoffman*, 535 U.S. at 147, and represents the result of long, difficult, and considered deliberations by Congress. Statement of President Reagan Upon Signing S. 1200, Nov. 10, 1986, *reprinted in* 1986 U.S.C.C.A.N. 5856-1, 5856-1 (observing that IRCA was "the product of one of the longest and most difficult legislative undertakings of recent memory").

The Supreme Court's recent analysis in *Arizona* of the federal framework regulating employment of undocumented immigrants is instructive in assessing Congress's intent to occupy the field. In that case, the Court held that an Arizona provision that made it a criminal offense for "unauthorized" immigrants to "perform," "apply for," or "solicit" work in a public place was conflict preempted. *Arizona*, 132 S.Ct. at 2502 (quoting A.R.S. § 13-2928(C)). In so holding, the Court described the federal regulation of employment of undocumented immigrants as "comprehensive," *id.*, and "careful[ly] balance[d]." *Id.* at 2505. Indeed, the federal framework includes detailed standards and procedures and reflects a deliberate balance between the competing objectives of deterring unlawful immigration and protecting vulnerable groups. *See supra,* Pt. II.A; *see also Arizona*, 132 S.Ct. at 2503–05 (describing federal scheme). This level of detail, breadth, and balance evidences a congressional intent to occupy the field. It leaves no room for state regulation, which would "'diminish[] the [Federal Government]'s control over enforcement' and 'detract[] from the 'integrated scheme of regulation' created by Congress.'" *Arizona*, at 2502 (quoting *Wisconsin Dept. of Industry v. Gould*, 475 U.S. 282, 288–89 (1986) (internal citation omitted)).[9]

b) Congress's occupation of the field of regulation of employment of undocumented immigrants includes regulation of fraud in the federal employment verification system

[9] The *Arizona* Court also clarified that that the existence in IRCA of an express preemption provision barring states in most instances from imposing penalties on employers of undocumented immigrants "'does *not* bar the ordinary working of conflict pre-emption principles' or impose a 'special burden' making it more difficult to establish the preemption of laws falling outside the clause." *Arizona*, 132 S.Ct. at 2496 (quoting *Geier*, 529 U.S. at 869–872).

i. Congress's scheme for regulating fraud in the federal employment verification system is detailed and comprehensive

In creating the federal framework for regulating employment of undocumented workers, Congress specifically considered the possibility that false information could be used to obtain employment and provided federal officials with a range of civil and criminal tools to address the issue. *See, e.g.*, 132 Cong. Rec. S16,879–01 (1986) (statement of Sen. Simpson, bill co-sponsor) (legislators "paid close attention to" the issue of document fraud and "provide[d] for this reality" by creating civil and criminal penalties).

First, Section 103 of IRCA amended 18 U.S.C. § 1546 pertaining to "Fraud and misuse of visas, permits, and other documents" to impose a criminal penalty for the use of a false identification document or making of a false attestation for purposes of satisfying the employment verification requirement. Pub. L. 99-603, § 103 (1986). Section 103 also expanded the prohibition on selling, making, or using fraudulent immigration documents to include those documents used "as evidence of authorized . . . employment in the United States." *Id.* (amending 18 U.S.C. § 1546(a)). In addition, Section 101 specifically designated the additional federal criminal statutes that could be applied to fraud in the employment verification process. *See* Pub. L. 99-603, § 101 (adding 8 U.S.C. § 1324a(b)(5) and listing applicable statutes in Title 18, Sections 1001 [false statements], 1028 [fraud in connection with identity documents], 1546, and 1621 [perjury]).

Second, Congress created civil penalties for document fraud.[10] 8 U.S.C. §1324c allows an administrative law judge to impose a fine, after a hearing, on any person or entity who knowingly "forge[s]," "use[s]," or "attempt[s]to use" a document not belonging to the possessor to satisfy the requirements of the INA, including for purposes of obtaining employment. 8 U.S.C. §§1324c(a)(1)-(4),1324c(d). Fines start at $250-2,000 and escalate for repeat offenders. *See* § 1324c(d)(3).

[10] Congress added these civil penalties to the federal framework through the Immigration Act of 1990 (IMMACT), Pub. L. 101-649, (codified as 8 U.S.C. § 1324c).

Third, Congress has established immigration consequences for document fraud in the employment verification process. *See, e.g.,* 8 U.S.C. § 1227(a)(3)(C)(i) (making "an alien who is the subject of a final order for violation of section 1324c of this title [] deportable"); 8 U.S.C. § 1182(a)(6)(C) (making those who make false claims to citizenship, including for purposes of establishing eligibility for employment, inadmissible and thus ineligible for adjustment of status to that of a lawful permanent resident).

Congress evidenced its intent to limit states' role in this scheme by circumscribing the punishment of fraud to certain federal provisions. Congress restricted the use of information provided as part of the employment verification process to enforcement of the INA and specific federal criminal statutes. *See* 8 U.S.C. § 1324a(b)(5) (restricting use of information provided as part of the employment verification process to "enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of Title 18").[11] Congress also provided that if the President makes any changes to the employment verification system, he must ensure that it continue to meet the requirement that it "not be used for law enforcement purposes, other than for enforcement of this chapter" or specifically enumerated federal criminal provisions. *See also* 8 U.S.C. §§ 1324a(d)(2)(C), (d)(2)(G), (b)(4) (containing further language limiting copying and use of documentation). As the Supreme Court has recognized, with these restrictions Congress "made clear" that "any information employees submit to indicate their work status" may be used only to enforce federal law and not for any other purposes. *Arizona*, 132 S.Ct at 2405.

ii. Congress's scheme for regulating fraud in the employment verification system is intended to be exclusive and to operate as a "harmonious whole" with the broader federal regulatory scheme addressing employment of undocumented workers.

Through its detailed scheme for addressing fraud in the employment verification system, Congress has done much more than express a "peripheral concern" with the

[11] This information includes "copies or electronic images of documents . . . used to verify an individual's identity or employment eligibility." 8 C.F.R. § 274a.2(b)(4).

1 issue. *De Canas v. Bica*, 424 U.S. 351, 360 (1976). It has fully occupied the field.

2 In fact, the Fourth Circuit recently held that 18 U.S.C. § 1546 and 1324c—two of
3 the regulations discussed above that address fraud in the employment verification
4 scheme—preempt state regulation. *United States v. South Carolina*, 720 F.3d 518, 532–
5 33 (4th Cir. 2013) (holding that state law "mak[ing] it unlawful for any person to display
6 or possess a false or counterfeit ID for the purpose of proving lawful presence in the
7 United States" is field and conflict preempted). The Court concluded that the breadth of
8 these provisions and the dominant federal interest in policing fraud to satisfy immigration
9 requirements evidenced Congress's intent to occupy the field. *See id. South Carolina*
10 provides strong persuasive authority that Congress has occupied the field of fraud in the
11 employment verification system.[12]

12 In assessing the preemptive effect of federal immigration regulation, the Ninth
13 Circuit, like the Fourth and other Circuits, looks to the comprehensiveness of the federal
14 scheme, the place of the scheme within a larger regulatory structure, and whether the
15 scheme directly evidences an intent to limit the role of states. *See Valle del Sol*, 732 F.3d
16 at 1026; *see also Lozano v. City of Hazleton,* 724 F.3d 297, 316 (3d Cir. 2013); *Georgia*
17 *Latino Alliance for Human Rights v. Governor of Georgia* ["*GLAHR*"], 691 F.3d 1250,
18 1263 (11th Cir. 2012); *South Carolina,* 720 F.3d at 530–31. Consideration of each of
19 these factors further confirms that Congress has occupied the field of fraud in the federal
20 employment verification process.

21 First, the federal scheme regulating fraud in the employment verification system is
22 comprehensive. As described above, Congress provided specific criminal penalties and
23 designated certain federal criminal statutes that apply to such fraud. *See, e.g.*, 8 U.S.C. §
24

25 [12] Although *South Carolina* addressed fraud to prove lawful presence, there is no basis
26 for distinguishing between fraud in that field and fraud in the employment verification field for preemption purposes. Both fields are fully occupied by Congress. *See* supra, p.
27 Pt. III.A.1.a (describing Congress's regulation of employment of undocumented immigrants). Furthermore, the Court in *South Carolina* did not base its decision on the comprehensiveness of the overall federal alien registration scheme, but rather on the
28 comprehensiveness of 8 U.S.C. § 1324c and 18 U.S.C. § 1546 themselves. *See South Carolina*, 720 F.3d at 533.

1324a(b)(5). In addition, Congress created a system for imposing civil sanctions, including fines and immigration penalties. *See* 8 U.S.C. §§ 1324c, 1227(a)(3)(C)(i), 1182(a)(6)(C). The civil fine provisions are enforced through a unified enforcement process that also covers the INA's employer sanctions and anti-discrimination provisions; all three are enforced through the Department of Justice's Executive Office for Immigration Review. *See* 8 U.S.C. § 1324a(e), 1324b(e)-(j), 1324c(d); 28 C.F.R. § 68.1.

Faced with a similarly comprehensive federal scheme involving the "harboring" of undocumented immigrants, this Circuit voided state criminal laws in the area as preempted. *See Valle del Sol*, 732 F.3d at 1023–26 (finding federal alien harboring scheme to be comprehensive because it included "a full set of standards," including graduated punishments); *see also Lozano*, 724 F.3d at 316–18; *South Carolina*, 720 F.3d at 531–32; *GLAHR*, 691 F.3d 1250, 1267; *We Are America v. Maricopa County Bd. of Sup'rs,* 297 F.R.D. 373, 388–92 (D. Ariz. 2013). Like the alien harboring scheme, the federal scheme for regulating fraud in the employment verification process reflects careful consideration by Congress, culminating in the decision to provide federal officials with a variety of tools to address a range of conduct. *See Valle del Sol*, 732 F.3d at 1025–26.

Second, just as federal regulation of alien harboring is one part of a broader "scheme governing the crimes associated with the movement of aliens in the United States," *Valle del Sol*, 732 F.3d at 1024*,* federal regulation of fraud in the employment verification system is one part of a broader scheme regulating employment of undocumented immigrants. *See Arizona*, 132 S.Ct. at 2504 (identifying laws addressing fraud as part of IRCA's regulatory scheme); *Hoffman*, 535 U.S. at 148 (same). Restrictions on fraud in the employment authorization system, together with other parts of the INA regulating employment of undocumented immigrants, constitute a "'full set of standards' designed to work as a 'harmonious whole.'" *Valle del Sol*, 732 F.3d at 1025 (quoting *Arizona*, 132 S.Ct. at 2501). The overall scheme reflects a "careful balance" designed to further different, and sometimes competing, priorities of deterring

employment of undocumented immigrants and protecting undocumented workers against exploitation. *Arizona*, 132 S.Ct. at 2505. Allowing states to impose their own penalties for fraud "would conflict with the careful framework Congress adopted." *Id.* at 2502.

Third, as discussed above at *supra* Pt. III.A.1.b.i, Congress specifically restricted the uses of the information employees submit to employers to indicate their work authorization status in order to obtain work, evidencing its intent to preclude state participation in the regulation of fraud in the employment verification process.

Further, fraud in federal regulatory schemes is generally a matter of purely federal concern. *Buckman Co. v. Plaintiff's Legal Committee*, 531 U.S. 341 (2001) (holding state tort law claim preempted where it was used to regulate fraud against a federal agency). In sum, "the comprehensive nature" of the federal scheme to regulate fraud in the employment verification system, "its place within the INA's larger structure," and its limitations on the role of states "demonstrate[] an 'overwhelmingly dominant federal interest in the field.'" *Valle del Sol*, 732 F.3d at 1026 (quoting *GLAHR*, 691 F.3d at 1264). They compel the conclusion that Congress has fully occupied the field. *See id.*

c) Arizona's worker identity provisions are preempted because they intrude on the field of employment of undocumented immigrants and the regulation of fraud in the federal employment verification system.

"Where Congress occupies an entire field . . . even complementary state regulation is impermissible."[13] *Arizona*, 132 S.Ct. at 2502. In other words, "States may not enter, in any respect" a field that has been occupied by the federal government. *Id.* By regulating

---

[13] This rule applies regardless of whether the field is one which is traditionally occupied by the states, and thus subject to a presumption of non-preemption, or one which is not traditionally occupied by the states, and thus not subject to any presumption. Because Arizona's worker identity provisions seek to regulate fraud in the federal employment verification system—an area not traditionally occupied by the states, *see South Carolina*, 720 F.3d at 532 (citing *Buckman*, 531 U.S. at 347)—the presumption against preemption should not apply. However, even if the presumption against preemption *did* apply, the "clear and manifest," evidence of Congress's intent to occupy the field found here, *see supra* Part III.A.1.a, b, is more than sufficient to overcome it. *Arizona,* 641 F.3d at 344 (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted); *see also id.* at 357–61, (finding state regulation of employment of undocumented immigrants preempted despite applying presumption of non-preemption); *GLAHR,* 691 F.3d at 1263, 1267 (finding state harboring law preempted despite applying presumption of non-preemption).

1 the use of false information to obtain employment, Arizona violated this "basic premise
2 of field preemption." *See id.*

3 Arizona's worker identity provisions are designed to deter the employment of
4 undocumented immigrants (and, in turn, the very presence of undocumented immigrants
5 in the state) by punishing those who use false identity information to obtain employment
6 in violation of federal law. *See* supra Pt. II.B. Arizona lawmakers candidly expressed
7 their intent to step into the federal role and regulate in this area because they disagreed
8 with the federal approach. *See id.* Arizona's worker identity provisions "serve[] plainly as
9 a means of enforcing" federal law against employment of undocumented immigrants—
10 "[n]o other purpose could credibly be ascribed." *Gould*, 475 U.S. at 287 (holding state
11 spending regulation preempted where "the manifest purpose" of the regulation was to
12 deter violations of federal labor laws); *see also Tayyari v. New Mexico State Univ.*, 495
13 F. Supp. 1365, 1376–80 (D.N.M. 1980) (holding state policy preempted in part because
14 policymakers' "true purpose in enacting the [policy] was to make a political statement"
15 about foreign affairs by retaliating against certain immigrants).

16 Congress has fully occupied the field of fraud in the employment verification
17 system. Accordingly, Arizona's attempt to enter the field violates the Supremacy Clause
18 of the United States Constitution. *See Arizona*, 132 S. Ct. at 2502 ("States may not enter,
19 in any respect, an area the Federal Government has reserved for itself").

20 2. *Arizona's Worker Identity Provisions are Conflict Preempted*

21 In addition to being field preempted, Arizona's worker identity provisions also
22 conflict with federal law. A state statute is conflict preempted if it "'stands as an obstacle
23 to the accomplishment and execution of the full purposes and objectives of Congress.'"
24 *Arizona*, 132 S.Ct. at 2501 (quoting *Hines*, 312 U.S. at 67). This is so where the state law
25 "would interfere with the careful balance struck by Congress" or "involves a conflict in
26 the method of enforcement." *Arizona*, 132 S.Ct at 2505. In determining whether a
27 conflict exists, "[t]he Supreme Court has also instructed that a preemption analysis must
28 contemplate the practical result of the state law, not just the means that a state utilizes to

accomplish the goal." *United States v. Alabama*, 691 F.3d 1269, 1291 (11th Cir. 2012).

a. Arizona's worker identity provisions conflict with the federal scheme by allowing Arizona to bring prosecutions in a manner unaligned with federal immigration enforcement priorities.

Where federal law reserves for federal authorities "prosecutorial power, and thus discretion," over certain violations, a state scheme allowing state prosecutions of the same activities "conflicts with the federal scheme." *Valle del Sol*, 732 F.3d at 1027. If it were otherwise, "the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Arizona*, 132 S.Ct. at 2503; *see also United States v. South Carolina*, 840 F. Supp. 2d 898, 926–27 (D.S.C. 2011) (noting danger of allowing states to "create an independent scheme of prosecution and judicial enforcement outside the control of the federal government"). Such an "intrusion upon the federal scheme" would stand as an obstacle to Congress's intent to bestow the executive with discretion and flexibility, and is therefore conflict preempted. *Arizona*, 132 S.Ct. at 2503.

The federal scheme to regulate fraud in the employment verification system reserves prosecutorial power to federal officials. *See* 8 U.S.C. § 1324c(d) (designating federal immigration officers and administrative law judges as having authority to conduct investigations and hearings); 8 U.S.C. § 1229a (providing for federal removal proceedings); 8 U.S.C. § 1324a(b)(5) (listing applicable federal criminal statutes); *see also* 18 U.S.C. § 3231 (providing that United States district courts have exclusive jurisdiction over federal criminal offenses). These federal officials are endowed with a wide variety of tools to combat fraud, ranging from civil fines and immigration penalties to criminal sanctions. The variety of tools further reflects congressional intent to confer enforcement discretion on the Executive. *See, e.g.*, *Buckman*, 531 U.S. at 349 (finding that variety of enforcement options evidenced congressional intent to bestow agency with discretion to pursue competing objectives). As discussed above, flexibility in enforcement is an essential aspect of the federal scheme—federal officials must balance a

range of priorities in addressing work by undocumented immigrants. *See supra* Pt. II.A. In this context, allowing the state of Arizona—and potentially forty-nine other states—to punish fraud in the employment verification system "in a manner unaligned with federal immigration priorities," *Valle del Sol*, 732 F.3d at 1027, "would interfere with the careful balance struck by Congress." *Arizona*, 132 S.Ct. at 2505. Because this would stand as an obstacle to Congress's intent, it is conflict preempted. *See Arizona,* 132 U.S. at 2502–03 (state law criminalizing failure to carry alien registration documents conflicts with federal framework where it interferes with federal prosecutorial discretion); *Valle del Sol*, 732 F.3d at 1027 (holding state harboring provision conflict preempted where it allowed state to prosecute without considering "federal immigration enforcement priorities"); *South Carolina*, 720 F.3d at 533 (holding state law regarding fraudulent identification documents to be conflict preempted where it interfered with prosecutorial discretion of federal officials).

State interference with federal regulation of the employment verification process is especially problematic because federal officials must balance enforcement of fraud provisions not only against other priorities reflected in the INA, but also against enforcement of federal labor laws and international agreements protecting the rights of undocumented workers. *See supra* Pt. II.A. This requires broad flexibility and discretion, including, at times, the discretion to forego sanctions where it would have the effect of suppressing the labor rights of undocumented workers. In contrast, the MCSO and MCAO's enforcement of the worker identity provisions do not appear to take into account such considerations, and have already had the effect of suppressing workers' rights. *See* Garcia Dec. at ¶¶18–19; Cervantes Dec. at ¶¶ 7–10; Romero Dec. at ¶¶ 6–9; de la Fuente Dec. at ¶¶ 7–9, 11.

Moreover, as the Supreme Court has explained, "[i]t is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate states." *Arizona*, 132 S.Ct. at 2498; *see also Hines*, 312

U.S. at 64 ("One of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country."). The federal government's ability to protect the labor rights of undocumented workers implicates these important foreign relations concerns. *See supra* Pt. II. A (describing NAALC Agreement). It is essential that the federal government be able to balance the various relevant concerns without interference from the states.

b. Arizona's worker identity provisions conflict with the federal scheme because they impose different penalties than federal law

Arizona's worker identity provisions conflict with federal law for an additional reason: they impose different penalties than federal law, thereby "disrupt[ing] 'the congressional calibration of force.'" *Valle del Sol*, 732 F.3d at 1027 (quoting *Crosby*, 530 U.S. at 380). *Compare* A.R.S. §§ 13-2208(A), 13-2009(A)(3) *with supra* Pt. III.A.1.b.i (listing federal civil and criminal provisions).

Notably, unlike the federal scheme for regulating fraud in the employment authorization system, which contemplates different types of sanctions depending on the conduct and circumstances, Arizona's worker identity provisions contemplate only criminal penalties. In practice, the federal scheme relies heavily on civil penalties in lieu of criminal sanctions. *See CRS Report*, at 6 (showing that ICE's worksite enforcement operations led to four times as many administrative charges as criminal charges). But Arizona has no ability to impose civil immigration penalties, and it has not established civil fines. Thus, its enforcement scheme differs from the federal scheme, and this difference puts Arizona's scheme in conflict with federal law. *See Arizona*, 132 S.Ct. at 2503 (finding conflict between state and federal laws penalizing failure to carry immigration documents because state law "rules out probation as a possible sentence (and also eliminates the possibility of a pardon)"); *Valle del Sol*, 732 F.3d at 1027 (holding state harboring provision conflict preempted where it provided different state penalties).

B. Plaintiffs Puente and Rev. Frederick-Gray Are Suffering and Will Continue to Suffer Irreparable Harm Absent a Preliminary Injunction

Absent a preliminary injunction of Arizona's worker identity provisions, Plaintiffs Puente and Rev. Frederick-Gray will suffer several distinct irreparable harms.[14]

First, members of Plaintiff Puente Arizona face the threat of prosecution under an unconstitutional state law. Puente may represent its members and assert harm on their behalf in place of requiring individual members to serve as litigants.[15] *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 341–46 (1977); 8 U.S.C. § 1229a; *Harris v. Bd. of Sup'rs*, 366 F.3d 754, 764, 766 (9th Cir. 2004 (affirming district court's grant of preliminary injunction and considering harm to plaintiff organization's members in assessing irreparable harm). It is a "well established" general principle "that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). In particular, when faced with a preempted state statute, controlling law holds that plaintiffs establish a likelihood of irreparable harm by demonstrating a credible threat of prosecution under the statute. *Valle del Sol*, 732 F.3d at

---

[14] The injunction Plaintiffs seek is prohibitory, thus the court need not "evaluate the severity of the harm" but must simply "determin[e] whether the harm to Plaintiffs was irreparable." *Arizona Dream Act Coalition v. Brewer*, __ F.3d __, 2014 WL 3029759 (9th Cir. July 7, 2014). The injunction is prohibitory because it would "prohibit[] a party from taking action" and preserve the last uncontested status between the parties preceding the pending controversy. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co*., 571 F.3d 873, 878–79 (9th Cir. 2009). Because plaintiffs contest Arizona's authority to enact the worker identity provisions, the last uncontested status is the period prior to the enactment of those provisions. *See Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 728, 732 n.13 (9th Cir. 1999); *see also GoTo.com, Inc. v. Walt Disney*, Co. 202 F.3d 1199, 1210 (9th Cir. 2000).

[15] To proceed on a claim of associational standing, an organization must show that (1) its members would have standing to bring the claim; (2) the interests sought to be protected are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires that the members participate individually in the suit. *See Hunt*, 432 U.S. at 343; *see also White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1038 (9th Cir. 2009). All of those requirements are met here. *See* Garcia Dec. ¶¶ 6 (describing Puente's mission), 13 (stating that members face threat of prosecution); *see also United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 546 (1996) (stating that individual participation is "not normally necessary when an association seeks prospective or injunctive relief for its members"). Given that the fear created by enforcement of Arizona's worker identity provisions makes it extremely unlikely that any individual Puente member would bring this case on his or her own, this is a particularly appropriate case for associational standing. *Cf. NAACP v. Alabama*, 357 U.S. 449, 459 (1958) (allowing NAACP to assert rights on behalf of its members where "to require that [the right] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion").

1029 (finding irreparable harm where plaintiff demonstrated a credible threat of prosecution under a preempted state statute); *see also Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 381 (1992)*; GLAHR*, 691 F.3d at 1269.

A credible threat of prosecution is established where a plaintiff "has alleged a likelihood of violating [a state statute] as interpreted by [the state's] law enforcement." *Valle del Sol*, 732 F.3d at 1016. Here, undocumented members of Puente are currently employed and have used false information to obtain and continue such employment, and Defendants continue to vigorously enforce the worker identity provisions. *See* Garcia Dec. at ¶ 13;[16] Statement of Joseph Arpaio, Minnesota Tea Party Special Event, *supra* (describing ongoing enforcement of worker identity provisions). Thus, Puente members face a credible threat of prosecution and, accordingly, will suffer irreparable harm in the absence of a preliminary injunction.

Second, Puente as an organization faces irreparable harms to its mission. For example, the climate of fear created by enforcement has reduced participation in Puente activities and events and made Puente members reluctant to exercise their rights, thereby frustrating Puente's mission to empower migrants to improve their quality of life. *See* Decl. of Carlos Garcia at ¶¶ 18–24, 27. In addition, Puente has had to cut back on core services in order to respond to enforcement of the worker identity provisions. *See id.* at 29-41. These injuries constitute irreparable harms to Puente as an organization. *See Valle del Sol*, 732 F.3d at 1018, 1029 (organizational plaintiffs established irreparable harm where they were experiencing ongoing harms to their organizational mission as a result of having to divert resources to educate members about the challenged law); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (finding irreparable

---

[16] Plaintiffs believe the declaration of Mr. Garcia, Puente's Executive Director, provides ample basis to find imminent injury to members of his organization who face future prosecution. *See, e.g., White Tanks Concerned Citizens*, 563 F.3d at 1038–39 (holding that affidavit from organizational plaintiff's director was sufficient to establish associational standing based on imminent injury to members). However, should the Court require additional declarations from individual Puente members, Plaintiffs are willing to produce such declarations and would work with the Court and defense counsel to develop an appropriate Protective Order or other protections.

harm where an unconstitutional law impacted organization's "ability to engage in its projects by forcing the organization to divert resources to counteract" the effects of the challenged law).

Third, Plaintiff Rev. Susan Frederick-Gray will suffer irreparable harm because her municipal taxes are being used to enforce the worker identity provisions. Rev. Frederick-Gray pays sales tax and property tax to Maricopa County. *See* Frederick-Gray Dec. at ¶¶ 5–6. Those taxes are being used towards enforcement of the worker identity provisions. *See supra* at Pt. II.B; *see also We Are America v. Maricopa County Bd. of Sup'rs,* 297 F.R.D. at 383 (finding that Maricopa County used taxes from County residents to operate its jails). The harm to Rev. Frederick-Gray as a Maricopa County resident and taxpayer is "'direct and immediate and the remedy by injunction to prevent the[] misuse [of her taxes] is not inappropriate.'" *Id*. at 385–86 (quoting *Frothingham v. Mellon*, 262 U.S. 447, 486–87 (1923)) (granting injunction to Maricopa County taxpayer to prevent implementation of unconstitutional law).

C. The Balance of Equities and Hardships Tips Sharply in Plaintiffs' Favor[17]

"'[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available.'" *Valle del Sol*, 732 F.3d at 1029 (quoting *Arizona*, 641 F.3d at 366). "In such circumstances, the interest of preserving the Supremacy Clause is paramount." *Arizona*, 641 F.3d at 366 (quoting *Cal. Pharmacists Ass'n v. Maxwell–Jolly*, 563 F.3d 847, 852–53 (9th Cir. 2009). Because, as described above, Arizona's worker identity provisions violate the Supremacy Clause, there cannot be any equitable interest in allowing the State of Arizona to enforce them, nor can there be harm in enjoining their

[17] Because the balance of hardships tips sharply in Plaintiffs favor, they "need not make as strong a showing of the likelihood of success on the merits" to merit a Preliminary Injunction. *Grand Canyon Trust v. Williams*, 2013 WL 4804484, at *1, *3 (D. Ariz. 2013) (citing *Alliance for the Wild Rockies*, 632 F.3d at 1134–35 (9th Cir. 2011)). Rather, "the existence of serious questions will suffice." *Id.* As described above, Plaintiffs satisfy the requirements for a preliminary injunction under this standard, as well as the non-sliding scale standard.

enforcement.

In contrast, if the injunction is not granted, the significant hardships being suffered by Plaintiffs, including Puente Arizona and its members, will continue. Puente members will worry every morning when they leave for work that they may be arrested and prevented from returning home at night, left instead to face the mental and emotional anguish of imprisonment. *See* Garcia Dec. at ¶ 13 (describing members' fear of arrest); Cervantes Dec. at ¶¶ 11–29 (describing experience of being arrested under worker identity provisions); Romero Dec. at ¶¶ 10–26 (same). Puente members will also be reluctant to exercise their labor rights, foregoing the benefits of federal labor protections. *See* Garcia Dec. at ¶ 18–19. Additionally, more Puente members and putative class members will find themselves ineligible for immigration relief as a result of convictions under A.R.S. §§ 13-2008(A) and 13-2009(A)(3).

D. An Injunction is in the Public Interest

As detailed above, the worker identity provisions are preempted; therefore, the public has a clear interest in enjoining their enforcement. This is especially true where, as here, "the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). Absent an injunction, not only Plaintiffs, but also all putative class members—including individuals who face prosecution under the challenged provisions and Maricopa County taxpayers—face serious harms. *See supra* Pt. III.B (describing irreparable harms). The public interest thus weighs heavily in favor of an injunction.

IV. CONCLUSION

For the foregoing reasons, the Court should grant a preliminary injunction.

1
2 RESPECTFULLY SUBMITTED this 7th day of August, 2014.
3
4 By /s/ Jessica Karp Bansal

5 Jessica Karp Bansal (admitted pro hac vice)
National Day Laborer Organizing Network
675 S. Park View St., Ste B
6 Los Angeles, CA 90057

7 Anne Lai (admitted *pro hac vice*)
Sameer Ashar (admitted *pro hac vice*)
8 University of California, Irvine School of
Law – Immigrant Rights Clinic
9 401 E. Peltason Dr., Ste. 3500
Irvine, CA 92616-5479
10

Daniel J. Pochoda
11 ACLU Foundation of Arizona
77 E. Columbus St., Ste. 205
12 Phoenix, AZ 85012

13 Ray A. Ybarra Maldonado
Law Office of Ray A. Ybarra Maldonado, PLC
14 2637 North 16th St., Unit 1
Phoenix, AZ 85006
15

Attorneys for Plaintiffs
16

On the brief:
17 Kathleen Borschow
Vivek Mittal
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August 2014, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail as indicated on the Notice of Electronic Filing.

Dated: August 7, 2014
Phoenix, Arizona

/s/ Gloria Torres .
Paralegal