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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 ARIZONA CONTRACTORS )  
ASSOCIATION, INC., an Arizona non- )  
10 profit corporation; ARIZONA )  
EMPLOYERS FOR IMMIGRATION )  
11 REFORM, INC., an Arizona non-profit )  
corporation; CHAMBER OF )  
12 COMMERCE OF THE UNITED )  
STATES OF AMERICA, a Washington )  
13 D.C. non-profit corporation; ARIZONA )  
CHAMBER OF COMMERCE, an )  
14 Arizona non-profit corporation; )  
ARIZONA HISPANIC CHAMBER OF )  
15 COMMERCE, INC., an Arizona non- )  
profit corporation; ARIZONA FARM )  
16 BUREAU FEDERATION, an Arizona )  
non-profit corporation; ARIZONA )  
17 RESTAURANT AND HOSPITALITY )  
ASSOCIATION, an Arizona non-profit )  
18 corporation; ASSOCIATED MINORITY )  
CONTRACTORS OF AMERICA, an )  
19 Arizona non-profit limited liability )  
company; ARIZONA ROOFING )  
20 CONTRACTORS ASSOCIATION, an )  
Arizona non-profit corporation; )  
21 NATIONAL ROOFING )  
CONTRACTORS' ASSOCIATION, an )  
22 Illinois not-for-profit corporation; )  
WAKE UP ARIZONA! INC., an )  
23 Arizona non-profit corporation; and )  
ARIZONA LANDSCAPE )  
24 CONTRACTORS ASSOCIATION, )  
INC., an Arizona non-profit corporation, )

No. CV07-02496-PHX-NVW (lead)  
No. CV07-02518-PHX-NVW (member)

**ORDER**

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Plaintiffs,

26

vs.

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1 CRISS CANDELARIA, Apache County )  
Attorney; ED RHEINHEIMER, Cochise )  
2 County Attorney; TERENCE C. )  
HANER, Coconino County Attorney; )  
3 DAISY FLORES, Gila County Attorney; )  
KENNY ANGLE, Graham County )  
4 Attorney; DEREK D. RAPIER, Greenlee )  
County Attorney; MARTIN BRANNAN, )  
5 LaPaz County Attorney; ANDREW P. )  
THOMAS, Maricopa County Attorney; )  
6 MATTHEW J. SMITH, Mohave County )  
Attorney; JAMES CURRIER, Navajo )  
7 County Attorney; BARBARA )  
LAWALL, Pima County Attorney; )  
8 JAMES P. WALSH, Pinal County )  
Attorney; GEORGE SILVA, Santa Cruz )  
9 County Attorney; SHEILA POLK, )  
Yavapai County Attorney; JON SMITH, )  
10 Yuma County Attorney; TERRY )  
GODDARD, Attorney General of the )  
11 State of Arizona; and FIDELIS V. )  
GARCIA, Director of the Arizona )  
12 Registrar of Contractors, )

13 Defendants. )

14 VALLE DEL SOL, INC.; CHICANOS )  
POR LA CAUSA, INC.; and SOMOS )  
15 AMERICA, )

16 Plaintiffs, )

17 vs. )

18 )  
19 TERRY GODDARD, in his official )  
capacity as Attorney General of the State )  
of Arizona; GALE GARRIOTT, in his )  
20 official capacity as the Director of the )  
Arizona Department of Revenue; and )  
21 ANDREW THOMAS, in his official )  
capacity as Maricopa County Attorney, )

22 Defendants. )  
23

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

13 **I. Standards for Injunction Pending an Appeal**

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

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

26 In general, to prevail on a motion for injunction pending appeal, the moving party  
27 must show either (1) “a strong likelihood of success on the merits” and “the possibility of  
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1 irreparable injury to plaintiff if preliminary relief is not granted” or (2) “that serious legal  
2 questions are raised and that the balance of hardships tips sharply in its favor.” *Golden*  
3 *Gate Restaurant Ass’n. v. City of San Francisco*, No. 07-17370, \_\_\_ F.3d \_\_\_, 2008 WL  
4 90078, at \*2, 2008 U.S. App. LEXIS 364, at \*4 (9th Cir. Jan. 9, 2008) (quoting *Natural*  
5 *Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007); *Lopez v. Heckler*,  
6 713 F.2d 1432, 1435 (9th Cir. 1983)). “These two formulations represent two points on a  
7 sliding scale in which the required degree of irreparable harm increases as the probability  
8 of success decreases.” *Winter*, 502 F.3d at 862. Courts must “consider ‘where the public  
9 interest lies’ separately from and in addition to” the balance of hardships between the  
10 parties. *Id.* at 863.

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

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

## 24 **II. Plaintiffs are Unlikely to Succeed in Invalidating the Act**

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

3 Congress has extensive authority to destroy residual state police powers—to close  
4 the fifty laboratories of experiment. The protection of our federalism lies in Congress  
5 having to do so clearly and having to answer for it. “[T]he structural safeguards inherent  
6 in the normal legislative process operate to defend state interests from undue  
7 infringement.” *Geier v. American Honda Motor Co.*, 529 U.S. 861, 907 (Stevens, J.,  
8 dissenting). But no one answers for it when, from special knowledge of purposes and  
9 proportionalities, the courts attribute preemption to Congress free of its own words that  
10 are plain enough to citizens. This would disarrange our federalism. It would require a  
11 bicameral majority to restore state power, rather than leaving state power as our  
12 constitutional default position in the absence of a federal bicameral majority. Plaintiffs  
13 are unlikely to succeed in reading the express preservation of state licensing sanctions out  
14 of IRCA.

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

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

1     **III. The Balance of Hardships Favors Defendants**

2             **A. Plaintiffs' Hardship is Minimal**

3             Plaintiffs' hardship comes down to nothing more than the expense of using E-  
4 Verify. If the federal government's statistics hold true for Arizona employers, 85% will  
5 spend less than \$100 to set-up E-Verify and 75% will spend less than \$100 annually to  
6 operate the system. The average employer will likely spend \$125 in set-up and \$728 in  
7 maintenance of the system. (Joint Statement of Stipulated Facts ("Facts"), Doc. # 152,  
8 Ex. 52 at 104.)

9             The Act's E-Verify requirement is an increment to the already pervasive regulation  
10 of labor and employment in our society. A complaint that there is more cost to comply  
11 with labor regulation has little purchase. It is difficult to establish irreparable injury  
12 based on prospective monetary damages alone. *See Stop H-3 Ass'n v. Volpe*, 353 F.  
13 Supp. 14, 18 (D. Haw. 1972) *rev'd on other grounds*, 533 F.2d 434 (9th Cir. 1976)  
14 (citations omitted) ("Traditionally, the irreparable injury contemplated by Rule 62(c) is  
15 that which will make the appeal moot. Thus, prospective monetary damage is *not*  
16 irreparable injury."). While the cost of using E-Verify meets the minimum for standing, it  
17 is not so great as to warrant an injunction. *See Yniguez v. Mofford*, 730 F. Supp. 309, 317  
18 (D. Ariz. 1990) *rev'd on other grounds*, 939 F.2d 727 (9th Cir. 1991) ("While Yniguez  
19 has established a sufficient threat of enforcement to provide an actual controversy for  
20 purposes of Article III and the Declaratory Judgment Act, she has not established an  
21 enforcement threat sufficient to warrant injunctive relief."); *Lawson v. Hill*, 368 F.3d 955,  
22 959 (7th Cir. 2004) ("Even if we are wrong to suppose the risk of prosecution too remote  
23 to confer standing to sue . . . the district judge was right not to enter an injunction . . . .  
24 [a]n injunction is an extraordinary remedy.").

25             Moreover, complying with E-Verify will have off-setting business benefits for  
26 Plaintiffs. It effectively ensures that they will be virtually immune from licensing  
27 sanction proceedings. *Arizona Contractors Ass'n v. Napolitano*, No.

1 CV07-1355-PHX-NVW, \_\_\_ F. Supp. 2d \_\_\_, 2007 WL 4293641, at \*11, 2007 U.S. Dist.  
2 LEXIS 90694, at \*34 (D. Ariz. Dec. 7, 2007). Based upon past users' experiences, an  
3 overwhelming majority of Arizona employers will likely find E-Verify an effective and  
4 convenient tool for employment verification, (Facts, Doc. # 152, Ex. 52 at 140), and will  
5 rate the program "Excellent," "Very Good," or "Good" (Facts, Doc. # 149, Ex. 13 at 4).

6 Plaintiffs submit two declarations from Arizona employers who assert that they  
7 will have to spend much more than the usual amount to set up E-Verify. (Facts, Doc. #  
8 150, Ex. 26 & 27.) Both are owners of franchise restaurants who allegedly will have to  
9 purchase computer equipment and dedicated Internet connections for each location to  
10 comply with E-Verify. One employer states that he will need to spend more than 82  
11 times the national average to set up the system. Both declarations state bare conclusions.  
12 Neither displays any of the resourcefulness one expects from business people seeking  
13 efficient solutions to problems. The failure to explain and exclude other solutions leaves  
14 the court unpersuaded that either declaration states a likely true cost. Even if the  
15 declarations are taken at face value, their costs are minor compared to the cost to the  
16 State, others, and to the public interest from suspending the Act, as explained below.

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

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

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

5 **A. The Arizona Legislature Has Declared the Public Interest**

6 The parties have submitted a number of expert reports and declarations concerning  
7 the effect of immigration on the Arizona economy and wages. Significantly, Plaintiffs'  
8 studies do not distinguish between the effect of authorized and unauthorized immigration.  
9 Only Defendants' expert, Prof. George Borjas, offers a conservative estimate of the effect  
10 of unauthorized alien labor on authorized labor, both alien and citizen. For this and other  
11 reasons discussed below, the court finds Defendants' expert to be persuasive.

12 In any event, this is not an appropriate forum for second guessing the Arizona  
13 legislature's decision that the public interest is best served by strongly deterring the  
14 knowing or intentional employment of unauthorized aliens. This court's "consideration  
15 of the public interest is constrained in this case, for the responsible public officials in [the  
16 State] have already considered that interest." *Golden Gate Restaurant Ass'n.*, 2008 WL  
17 90078, at \*13, 2008 U.S. App. LEXIS 364, at \*37. The Arizona legislature, like the  
18 federal government before it, balanced competing social and economic interests and  
19 decided in favor of an economy for those authorized to work in the United States. "[If it  
20 were obvious that the [Act] was unconstitutional or preempted by a duly enacted federal  
21 law[,] there might be some basis to conclude that the public interest is not served by the  
22 Arizona legislature's preferred values. *Id.* However, one cannot by any stretch of reason  
23 describe the Act as obviously invalid. It is therefore in the public interest that this court  
24 exercise its "discretionary power with proper regard for the rightful independence of state  
25 governments in carrying out their domestic policy." *Id.* (quoting *Burford v. Sun Oil Co.*,  
26 319 U.S. 315, 318 (1943)). Declining an injunction pending appeal will allow the Act's

1 continued application, and therefore will “in a real sense, preserve rather than change the  
2 status quo.” *Id.* at \*3, 2008 U.S. App. LEXIS 364, at \*7.

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

5 In addition to noting the illegitimacy of disagreeing with the legislative body’s  
6 preferred values, the court of appeals in *Golden Gate Restaurant Association* did assess  
7 the harm to the public and the beneficiaries of the challenged ordinance. *Id.* at \*13, 2008  
8 U.S. App. LEXIS 364, at\* 35–37. Here also, the court is persuaded by Defendants’  
9 expert, Prof. George Borjas, that the number of unauthorized workers in Arizona is very  
10 substantial and that their presence in the work force drives down wages for competing  
11 authorized workers. For high school dropouts alone, wages are depressed by at least  
12 4.7%, or about \$950 annually. This exceeds \$200 million per year just for those  
13 authorized workers. The numbers are far greater when including all authorized workers.  
14 (Facts, Doc # 150, Ex. 1 of Ex. 39 at 16.) Again, though these are gross estimates, Prof.  
15 Borjas has favored conservative figures.

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

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

1           These expert reports include, and therefore inappropriately attempt to give weight  
2 to, the value of benefits produced by unauthorized alien labor. The benefits in fact to  
3 those who come to this country against the law to make better lives for themselves, to  
4 those who save from lower cost labor and general depression of wages from employing  
5 unauthorized aliens, and to those who enjoy the products of unauthorized labor at lower  
6 prices, do not count. The beneficiaries chosen identically by federal and Arizona law  
7 prevail over all who benefit from unauthorized alien labor. They are the authorized  
8 workers in the United States who compete with unauthorized aliens. *See Incalza v. Fendi*  
9 *N. Am., Inc.*, 479 F.3d. 1005, 1011 (9th Cir. 2007) (quoting H.R. Rep. 99-682(I), at 46, *as*  
10 *reprinted in* 1986 U.S.C.C.A.N. at 5650) (“In passing IRCA, Congress wished to stop  
11 payments of wages to unauthorized workers, which act as a ‘magnet . . . attract[ing] aliens  
12 here illegally,’ and to prevent those workers from taking jobs that would otherwise go to  
13 citizens.”). For these reasons, Plaintiffs’ experts’ conclusions are not helpful or  
14 persuasive in balancing the hardships.

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

23           **C.     An Injunction Would Forfeit the Deterrence Already Achieved**

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

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

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

15       Another factor in the public interest further disfavors an injunction in this case.  
16 Though the Act could survive without E-Verify, that mandatory verification system  
17 greatly aids the Act's economy and effectiveness, and provides easy avoidance of  
18 liability. The Act directly serves the interests of Congress, which is to experiment with  
19 and refine the employment eligibility verification system. Unless extended, E-Verify's  
20 authorization will expire in November, 2008. Basic Pilot Program Extension and  
21 Expansion Act of 2003 ("Expansion Act"), Pub. L. No. 108-156, 117 Stat. 1944 (note  
22 following 8 U.S.C. § 1324a (Supp. IV. 2000)). Before then, Congress would benefit from  
23 the experience of Arizona employers under the Act.


24       **V.     CONCLUSION**

25       Plaintiffs have shown neither a likelihood of success on the merits nor a balance of  
26 hardships in their favor. An injunction pending appeal is not warranted.  
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IT IS THEREFORE ORDERED that the motions for injunction pending appeal (Doc. ## 181, 182, and 183) are denied.

DATED this 19<sup>th</sup> day of February, 2008.

  
\_\_\_\_\_  
Neil V. Wake  
United States District Judge