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If You Want Something Done Right . . . : Chicanos Por La Causa v. Napolitano and the Return of Federalism to Immigration Law

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**IF YOU WANT SOMETHING DONE RIGHT . . . :
CHICANOS POR LA CAUSA V. NAPOLITANO AND THE
RETURN OF FEDERALISM TO IMMIGRATION LAW**

Randall G. Shelley, Jr.

I. Introduction	603
II. Background.....	607
A. Federal Legislation on Employment of Illegal Immigrants.....	607
B. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the New Landscape of Employment Verification	609
C. Federal-State Cooperation Under IRCA.....	611
D. The Legal Arizona Workers Act.....	612
III. Statement of the Case	613
A. Statement of Facts.....	613
B. Procedural History	614
C. Competing Arguments.....	615
D. The Ninth Circuit Court of Appeals’ Decision.....	619
IV. Analysis	621
A. The Burden on Employers	622
B. The Rebirth of Federalism in Immigration Law	624
C. Benefits of the Arizona Act	630
D. The Impact of Chicanos Por La Causa	632
V. Conclusion.....	636

I. INTRODUCTION

The Immigration Reform and Control Act of 1986, the lynchpin of federal regulation of illegal immigration, has failed, and as a result, the

State of Arizona has taken action on its own.¹ This action flies in the face of conventional thought about the role of states in regulating immigration, not to mention the Constitutional directive that immigration is the exclusive province of the Congress.² Arizona's hope is that Congress will reform immigration law to be more effective and successful in protecting the country's borders; however, Arizona is unwilling to do nothing in the meantime.³ In July 2007, the Arizona Legislature enacted the Legal Arizona Workers Act ("the Act" or "the Arizona Act"), which imposes sanctions on employers who knowingly or intentionally hire illegal immigrants.⁴ The statute was met immediately by a wave of lawsuits.⁵ The Ninth Circuit Court of Appeals upheld the statute despite these facial challenges in *Chicanos Por La Causa v. Napolitano*.⁶

In upholding the Legal Arizona Workers Act, the Ninth Circuit Court of Appeals has allowed Arizona to put the burden of determining

1. 8 U.S.C. §§ 1324a to 1324c (1996); Letter from Janet Napolitano, Governor, Ariz., to Jim Weiers, Speaker of the House, Ariz. House of Representatives (July 2, 2007), *available at* http://www.azsos.gov/public_services/Chapter_Laws/2007/48th_Legislature_1st_Regular_Session/CH_279.pdf.

2. *See* U.S. CONST. art. I, § 8, cl. 4 (Congress has the power "[t]o establish a uniform Rule of Naturalization"); *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (recognizing that immigration law, specifically "governing admission to our Nation and status within our borders" is a power committed to the federal government . . . "only rarely are such matters relevant to legislation by a State").

3. *See* Letter from Janet Napolitano to Jim Weiers, *supra* note 1. *See also infra* notes 59-63 and accompanying text. The question of what to do about the influx of illegal immigrants has plagued the federal government for years. *See* H.R. REP. No. 99-682(I), at 51 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5655; *infra* note 31 and accompanying text. While whether illegal immigration itself is a "problem" is debatable, there is no question that it is a problem in the eyes of a large proportion of United States citizens. *See, e.g.*, Ronald Brownstein, *Times/Bloomberg Poll; Most Back Tighter Border and a Guest-Worker Plan*, L.A. TIMES, Apr. 13, 2006, at A1. The Los Angeles Times poll found that 84 percent of people surveyed thought illegal immigration to be a problem and 31 percent thought it to be a major problem. *Id.* Politicians live on votes and if nearly a third of voters believe illegal immigration to be a big problem, that is surely enough of a voting block to get politicians to trumpet illegal immigration as a crisis. *See id.*

4. ARIZ. REV. STAT. ANN. §§ 23-211 to -216 (2008). *See also infra* Part II.D. The Arizona Legislature overwhelmingly passed the Legal Arizona Workers Act. ARIZONA STATE LEGISLATURE SENATE RESEARCH, FINAL AMENDED FACT SHEET FOR H.B. 2779, 1st. Sess. (June 22, 2007), *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/summary/s.2779approp_aspas sedbyleg.doc.htm. The statute passed the Arizona House of Representatives by a vote of forty-seven in favor, eleven against, with two abstentions. *Id.* It passed the Arizona Senate twenty in favor, four against, with six abstentions. *Id.*

5. *Ariz. Contractors Ass'n v. Candelaria (Ariz. Contractors II)*, 534 F. Supp. 2d 1036, 1040-41 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2008). *See also infra* note 70 and accompanying text.

6. *Chicanos Por La Causa*, 558 F.3d at 861. *See also infra* Part II.D.

the legal status of employees where it belongs, with the employer, who is unquestionably in the best position to determine the legal status of potential employees.⁷ Additionally, the Legal Arizona Workers Act, in forcing employers to verify the legal status of employees, advances Congress's objectives to eliminate unauthorized alien employment by attacking the sources of employment without conflicting with the Immigration Reform and Control Act of 1986 (IRCA).⁸ The court's decision also reaffirms the fundamental principles of federalism, under which the Supreme Court has long recognized that state governments can regulate concurrently with the federal government unless Congress decides "to displace local law or the necessity for the Court to invalidate local law because of the dormant national power."⁹

Arizona's efforts to prod Congress into reforming immigration law were spearheaded by Arizona's then-Governor, Janet Napolitano.¹⁰ During her two terms as governor, Napolitano fiercely criticized the federal government for its failures to both enforce and reform immigration law.¹¹ When nominated by President Barack Obama to be the Secretary of Homeland Security, Napolitano's experience with immigration issues led to support from both Democrats and Republicans, including former Presidential candidate John McCain.¹² If the Arizona Act and her comments about it are any indication, Secretary Napolitano will likely push for more federal-state cooperation on immigration.¹³ Eventually, then, she will be able to push for the

7. See *infra* notes 108-24 and accompanying text.

8. *Chicanos Por La Causa*, 558 F.3d at 866.

9. *United States v. Lopez*, 514 U.S. 549, 569 (1995) (Kennedy, J., concurring) (citing *Cooley v. Board of Wardens of Port of Philadelphia*, ex rel. Soc. for Relief of Distressed Pilots, 12 How. 299, 318-21 (1852)). See also *infra* notes 147-61 and accompanying text. In particular, see *infra* note 156 and accompanying text.

10. See Letter from Janet Napolitano to Jim Weiers, *supra* note 1.

11. E.g., Daniel González and Sean Holstege, *Napolitano Pick Signals Moderate Immigration Approach*, THE ARIZONA REPUBLIC, Nov. 21, 2008, available at <http://www.azcentral.com/news/articles/2008/11/21/20081121borderpolicy1121.html>. Among the things she criticized the government about was the removal of the National Guard from the Mexican border without completing the border fence and the passage of the REAL ID Act of 2005. *Id.* Napolitano was also critical of federal immigration policy generally, perhaps especially IRCA. See Letter from Janet Napolitano to Jim Weiers, *supra* note 1.

12. See Jim Abrams, *Senate Approves 6 Obama Cabinet Picks*, PITT. POST-GAZETTE, Jan. 21, 2009, at B4. Napolitano was among six nominees that were confirmed "with a single voice vote" hours after Obama took office. See also Jacques Billeaud, *McCain to seek 5th Senate term*, FT. WAYNE J. GAZETTE, Nov. 26, 2008, at 9A (McCain said he would seek Napolitano's confirmation, saying that she is "highly qualified for the job.>").

13. See *infra* notes 168-185 and accompanying text.

comprehensive reform she has long advocated, and the absence of which made the Arizona Act necessary.¹⁴

Part II of this note will explore the background of the issues involved in *Chicanos Por La Causa* by looking at them through the lens of federal immigration policy.¹⁵ This will include an in-depth assessment of IRCA, including the goals and policies that drove Congress to enact it.¹⁶ The discussion will then delve into the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the new employee verification system that accompanied it.¹⁷ Next, this note will examine federal-state cooperation under IRCA.¹⁸ The background will then conclude with a look at the Legal Arizona Workers Act.¹⁹

Part III of this note will analyze *Chicanos Por La Causa v. Napolitano*, including the facts, procedural history, issues raised, and the circuit court opinion.²⁰ Part IV will analyze the circuit court's decision and explain why it was correct.²¹ This will include a discussion of the burden the Act imposes on employers.²² It will also examine the decision's repercussions for federalism in immigration, including a discussion of the legal and practical reasons for non-preemption.²³ The analysis will then briefly examine Secretary Napolitano's priorities as head of Homeland Security, and the new avenues for immigration reform that the Ninth Circuit's decision potentially creates for her.²⁴ The analysis will conclude with a look at the benefits of the court's decision and the potential impact it will have on the present and future of immigration law in the United States.²⁵ Part V concludes that this case is an important first step toward comprehensive reform of federal immigration law.²⁶ It also concludes that there is a potential for even greater benefits from the court's decision in the future.²⁷

14. See *Napolitano Pick Signals*, *supra* note 11. See also Letter from Janet Napolitano to Jim Weiers, *supra* note 1.

15. See *infra* notes 28-63 and accompanying text.

16. See *infra* notes 28-42 and accompanying text.

17. See *infra* notes 43-52 and accompanying text.

18. See *infra* notes 53-58 and accompanying text.

19. See *infra* notes 59-63 and accompanying text.

20. See *infra* notes 64-123 and accompanying text.

21. See *infra* notes 124-233 and accompanying text.

22. See *infra* notes 128-43 and accompanying text.

23. See *infra* notes 144-96 and accompanying text.

24. See *infra* notes 197-202 and accompanying text.

25. See *infra* notes 203-33 and accompanying text.

26. See *infra* notes 234-53 and accompanying text.

27. See *infra* notes 240-43, 45 and accompanying text.

II. BACKGROUND

A. Federal Legislation on Employment of Illegal Immigrants

Congress enacted the first law punishing employers for hiring illegal immigrants in 1986.²⁸ Earlier laws, while punishing “importation, transportation, and harboring of undocumented aliens,” expressly excluded employment from their sanctions.²⁹ The new law, the Immigration Reform and Control Act of 1986, “‘forcefully’ made combating the employment of illegal aliens central to ‘[t]he policy of immigration law.’”³⁰ The reasoning behind finally sanctioning employers was to end “the magnet” that brings undocumented aliens to the United States.³¹

IRCA provides for both civil and criminal sanctions against employers who knowingly hire, recruit, or refer unauthorized aliens for employment.³² Congress believed punishing employers would stop them from hiring unauthorized aliens.³³ The lack of available employment was then expected to lower the number of immigrants coming to the United States illegally.³⁴ As previous efforts to control the flow of

28. H.R. REP. NO. 99-682(I), at 45 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5649. “The bill *establishes* penalties for employers . . .” (emphasis added) *Id.* None of the previous congressional acts dealing with illegal immigration dealt directly with employers in this way. *See, e.g.* H.R. REP. NO. 99-682(I); Consolidated Opening Brief for Plaintiff/Appellant at 21, *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2008) (Nos. 07-17272, 07-17274, 08-15357, 08-15359, 08-15360), 2008 WL 2131124.

29. H.R. REP. NO. 99-682(I), at 52. The earlier law was the Immigration and Nationality Act of 1952. *Id.* at 51-52. Despite being explicitly excluded from the 1952 Act as passed, employer sanctions were proposed at the time. *Id.* at 51.

30. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002). In *Hoffman Plastic*, the National Labor Relations Board (NLRB) had awarded back pay to an unauthorized immigrant who was fired prior to being found to be working in the United States illegally for participating in the organizing of a union. *Id.* at 140. In a 5-4 decision, the Supreme Court ruled that back pay could not be awarded to a worker who was never legally allowed to work in the United States. *Id.* The Court reasoned that the NLRB was “foreclosed by federal immigration policy,” particularly IRCA, from awarding such backpay. *Id.*

31. H.R. REP. NO. 99-682(I), at 45-46. The language of the purpose section of the House Report leaves no doubt that the House believed employers to be at fault with regard to the presence of unauthorized aliens working in the United States. *See id.*

32. 8 U.S.C. § 1324a(f) (1996) (criminal penalties); 8 U.S.C. §§ 1324a(e)(4), 1324a(g)(2) (civil penalties). *See also* H.R. REP. NO. 99-682(I), at 46.

33. H.R. REP. NO. 99-682(I), at 46. The falsity of this belief was part of the reason the state of Arizona enacted the Arizona Legal Workers Act. *See infra* notes 59-60 and accompanying text.

34. H.R. REP. NO. 99-682(I), at 46. Congress also hoped that limiting the flow of illegal immigration would allow more immigrants to enter the country legally. *Id.* IRCA also made “limited” changes to the legal immigration process. *Id.* at 45. A further reason for IRCA’s adoption was that Congress felt that continued illegal immigration would lead to widespread resentment of

illegal immigration had failed, Congress created IRCA as a major overhaul of federal immigration law and policy.³⁵ Prior to IRCA's passage, Congress had struggled for years to develop and enact comprehensive immigration reform.³⁶ Despite extensive cooperation between Congress and the executive branch, little effective action was taken on the issue of illegal immigration.³⁷ With the passage of IRCA, Congress hoped employers would lose the incentive to hire undocumented workers and, therefore, that such workers would not risk

foreigners, whether lawfully admitted or not. *Id.* at 46. As we have seen in the decades since, as Americans have become increasingly paranoid of immigrants, legal or otherwise, Congress's fear of this attitude was justified. *See, e.g.*, Ediberto Román, *The Alien Invasion?*, 45 HOUS. L. REV. 841 (2008) (discussing American attitudes towards immigrants, particularly Latin American illegal immigrants); Lupe S. Salinas, *Immigration and Language Rights: The Evolution of Private Racist Attitudes into American Public Law and Policy*, 7 NEV. L. J. 895 (2007) (discussing the anti-immigrant sentiments behind the push for English-only language legislation).

35. *See* H.R. REP. No. 99-682(I), at 51-56. Congress had been trying to deal with illegal immigration since the early 1950s with limited success. *Id.* at 51. Congress even made attempts in the early 1950s to penalize employers for hiring unauthorized aliens as part of the Immigration and Nationality Act of 1952. *Id.* at 51-52. However, the resulting legislation penalized only "the willful importation, transportation, or harboring" of illegal immigrants. *Id.* at 52. Those offenses were felonies and were punishable by a fine and/or up to five years in prison. *Id.* Employment, however, was exempted from these sanctions under what was known as the "Texas proviso." *Id.* Bills sanctioning employers for knowing employment of illegal immigrants passed the House of Representatives during both the 92nd and 93rd Congresses. *Id.* Similar to IRCA, the aim of these bills was to take away the incentive for illegal aliens to come to the United States while simultaneously removing "the incentive for employers to exploit this source of labor." *Id.* The Senate did not act on either of the bills, though both received the support of the executive branch. *Id.* The House of Representatives tried again during the 94th Congress in 1975; however, that bill only made it passed the subcommittee stage and never received action by the full House. *Id.*

36. *See id.* at 51-56. Previous to the 99th Congress's passage of IRCA, immigration reform had been a major focus of the 95th, 97th, 98th, and 99th Congresses. *Id.* at 53-56. Before the 95th Congress, meaningful immigration reform was more of a concern of the Executive Branch than the legislature, particularly during the Ford and Carter Administrations. *Id.* at 53.

37. In 1975, President Gerald Ford created a cabinet-level committee to study the impact of undocumented aliens. *Id.* After nearly two years of study the executive committee, like the House of Representatives, recommended sanctioning employers. *Id.* In 1977, "President Carter proposed civil penalties for the employment of undocumented aliens [and] increased Southwest border enforcement." *Id.* Carter's proposal ended in Senate Judiciary Committee hearing but nothing else. *Id.* Congress continued to work with the Carter administration, however, by creating the "Select Commission on Immigration and Refugee Policy." *Id.* The committee's task was to study immigration policy and recommend "legislative and administrative change[s]." *Id.* The result of this committee was a recommendation for employer sanctions, just as the House of Representatives and the President had been working toward all along. *Id.* Finally, in 1981, the 97th Congress held joint subcommittee hearings on immigration for the first time since 1951. *Id.* at 54. The bill stalled in various committees and received alterations before finally transforming into the Immigration Reform and Control Act. *Id.* at 54-56.

coming to the United States (or violating their status once admitted) in the absence of a certain job market.³⁸

Congress built into IRCA's statutory scheme the necessary requirement that employers verify the employability of their employees before hiring them.³⁹ At the time of IRCA's enactment, this requirement meant mainly that the employer had to examine the documentation of potential employees and fill out a form verifying that she believed that documentation to be authentic.⁴⁰ With limited exceptions, all that is required to escape IRCA liability is to make a good faith effort to comply with its mandates.⁴¹ If it reasonably appears that the employee is authorized to work in the United States, the employer is not subject to IRCA's sanctions.⁴²

B. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the New Landscape of Employment Verification

IRCA's initial employment verification system, the I-9 system, was paper-based.⁴³ However, the I-9 system was "undermined by fraud."⁴⁴ As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress instituted three "pilot programs" for

38. See *Steiben v. INS*, 932 F.2d 1225, 1228 (8th Cir. 1991) (discussing Congress's rationale for imposing sanctions on employers for knowingly hiring illegal immigrants).

39. 8 U.S.C. § 1324a(b) (1996). This verification requirement existed even before the establishment of the E-Verify system, which was not developed until 1996. See Pub. L. No. 104-208, §§ 401-405, 110 Stat. 3009-655 to 3009-665 (1996) (note following 8 U.S.C. § 1324a).

40. 8 U.S.C. § 1324a(b)(1). Further requirements also included the employee himself attesting to her right to legally work in the United States and retention of the employee verification forms for a specified period of time. 8 U.S.C. § 1324a(b)(2), (3).

41. 8 U.S.C. § 1324a(b)(6). These exceptions include only failure to correct noncompliance and "engaging in a pattern or practice of violations . . ." 8 U.S.C. § 1324a(b)(6)(B), (C).

42. 8 U.S.C. § 1324a(b)(6). IRCA's definition of "unauthorized alien":
As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

8 U.S.C. § 1324a(h)(3).

43. 8 U.S.C. § 1324a(b). "I-9" was simply the name of the form that had to be filled out and filed. See *Ariz. Contractors Ass'n v. Napolitano (Ariz. Contractors I)*, 526 F. Supp. 2d 968, 972 (D. Ariz. 2007). The I-9 process is subject to both "document and identity fraud, allowing upwards of eleven million unauthorized workers to gain employment in the United States . . ." *Ariz. Contractors Ass'n v. Candelaria (Ariz. Contractors II)*, 534 F. Supp. 2d 1036, 1043 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa v. Napolitano*, 558 F. 3d 856 (9th Cir. 2008).

44. *Ariz. Contractors I*, 526 F. Supp. 2d at 973. The district court identifies two types of fraud that appear to be especially common with the I-9 system. *Id.* The first type is document fraud, where "employees present counterfeit or invalid documents." *Id.* The second type is identity fraud, where employees provide someone else's documents. *Id.*

employment verification.⁴⁵ Of those three pilot programs, the basic pilot program (since renamed “E-Verify”) is the preferred employment verification program of the federal government.⁴⁶ E-Verify is a free, internet-based verification system employers may use.⁴⁷ Many employers have chosen to enroll in E-Verify while others have not.⁴⁸ E-

45. See Pub. L. No. 104-208, § 401, 110 Stat. 3009-655 (1996) (note following 8 U.S.C. § 1324a). These programs were (1) the basic pilot program, (2) the citizen attestation pilot program, and (3) the machine-readable-document pilot program. *Id.* Each of these programs operates using similar procedures. Pub. L. No. 104-208, § 403(b), (c), 110 Stat. 3009-662 to -663. These procedures require employers to collect information, such as social security numbers or an identification or authorization number provided by the Immigration and Naturalization Service (or, since 2001, the Department of Homeland Security). Pub. L. No. 104-208, §§ 401-405, 110 Stat. 3009-655 to -665, *amended by* Pub. L. No. 107-128, § 2, 115 Stat. 2407; Pub. L. No. 108-156, §§ 2-3, 117 Stat. 1944. The collected information is then recorded on an I-9 form and submitted for confirmation. Pub. L. No. 104-208, § 403, 110 Stat. 3009-659 to -663. Under the citizen attestation pilot program, an employer did not have to verify some workers’ authorization if the individual attested to United States citizenship “under penalty of perjury on an I-9 or similar form which form state[d] on its face the criminal and other penalties provided under law for a false representation of United States citizenship.” § 403(b)(3), 110 Stat. at 662. This program was required for implementation in at least five states that issue photo identification with security features. Pub. L. No. 104-208, § 401(c)(2), 110 Stat. 3009-656; Pub. L. No. 104-208, § 403(b)(2)(A), 110 Stat. 3009-662. The machine-readable-document pilot program was required for implementation in at least five states that issue identification that includes “a machine-readable social security account number.” Pub. L. No. 104-208, § 401(c)(3), 110 Stat. 3009-656; Pub. L. No. 104-208, § 403(c)(2), 110 Stat. 3009-663. Employers were required to scan the machine-readable features to verify eligibility for employment. § 403(c)(3), 110 Stat. at 663. Employers who relied on the information provided by any of the three pilot programs were protected from liability for reliance on information provided by the verification system. § 403(d), 110 Stat. at 663.

46. U.S. Department of Homeland Security: E-Verify, http://www.dhs.gov/files/programs/gc_1185221678150.shtm (last visited July 27, 2009). Specifically, the Department of Homeland Security refers to E-Verify as “the best means available for determining employment eligibility.” *Id.* Furthermore, President George W. Bush issued Executive Order 13,465, amending Executive Order 12,989, on June 6, 2008, which required the Department of Homeland Security to designate an electronic verification system which would then be mandatory for all employers contracting with the federal government. Exec. Order No. 13465, 73 Fed. Reg. 33285 (June 6, 2008). When designating a verification system, the Department chose E-Verify. Press Release, Department of Homeland Security, DHS Designates E-Verify as Employment Eligibility Verification System for All Federal Contractors (June 9, 2008), *available at* http://www.dhs.gov/xnews/releases/pr_1213039922523.shtm.

47. U.S. Department of Homeland Security, *supra* note 46. There is nothing in IRIRA making one particular pilot program or the other mandatory. *E.g.*, Answer Brief for Defendant/Appellee at 37-38, *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2008) (Nos. 07-17272, 07-17274, 08-15357, 08-15359, 08-15360), *available at* <http://azeir.org/pdf/defendants-answering-brief.pdf>; Consolidated Opening Brief for Plaintiff/Appellant, *supra* note 28, at 38-39.

48. *Ariz. Contractors I*, 526 F. Supp. 2d at 973. According to the district court’s findings of fact, the majority of employers who use E-Verify believe it works well. *Id.* at 974. The majority of those who have not enrolled cite cost concerns. *Id.* at 971. However, the benefits of enrollment for employers are many, including certain proof that the employer complied in good faith with the

Verify notifies employers of most employees' statuses immediately.⁴⁹ Most employers that use E-Verify find it reliable and beneficial.⁵⁰ By instituting E-Verify as the preferred method of employment verification, the executive branch is seeking to make it easier for employers to comply with IRCA.⁵¹ In so doing, the government's hope is that the underlying purposes of IRCA will be attained more easily and efficiently.⁵²

C. Federal-State Cooperation Under IRCA

By its plain language, IRCA preempts most state laws punishing employers for employing unauthorized aliens.⁵³ Because of this preemption, when Congress adopted IRCA, sanctioning of employers became largely the responsibility of the federal government.⁵⁴ In 1996,

verification requirements. *Id.* An employer who does not enroll, on the other hand, is a "near certain" loss in any future enforcement proceeding. *Id.*

49. *Id.* at 974. Ninety-two percent of submissions are verified (or not) "within seconds." *Id.* Dealing with nonconfirmations can take weeks but usually takes a just a few days. *Id.*

50. *Id.* An "overwhelming" proportion of employers found it reliable in a 2002 evaluation. *Id.* Ninety-three percent of employers found it easier than the I-9 system. *Id.* Ninety-two percent said E-Verify was not overly burdensome. *Id.* Of those, 60 percent said the program was "not at all burdensome." *Id.* The Social Security Administration conducted a survey of fifty large-volume users in 2006 in which all fifty rated the E-Verify system as "Excellent," "Very Good," or "Good." *Id.*

51. See *supra* note 46 and accompanying text. The pertinent text of Executive Order 13,465 stated:

Executive departments and agencies that enter into contracts *shall require*, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract.

Exec. Order No. 13465, 73 Fed. Reg. 33285 (June 6, 2008). By requiring verification via a designated system, the President made compliance quite simple, because IRCA requires only a "good faith attempt to comply." 8 U.S.C. § 1324a(b)(6) (1996).

52. See *supra* note 46 and accompanying text. See also H.R. REP. No. 99-682(I), at 45-49 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5649-53 (for the underlying purposes of IRCA).

53. 8 U.S.C. § 1324a(h)(2). IRCA's preemption provision specifically allows the imposition of sanctions on employers "through licensing and similar laws." *Id.* That allowance is the fulcrum on which the court's decision in *Chicanos Por La Causa* rests. See *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2008).

54. See 8 U.S.C. § 1324a(h)(2). Had Congress intended the states to have concurrent authority to punish employers, IRCA would not have used such a broad, sweeping provision. *Ariz. Contractors Ass'n v. Candelaria (Ariz. Contractors II)*, 534 F. Supp. 2d 1036, 1045-46 (D. Ariz. 2008), *aff'd sub nom Chicanos Por La Causa*, 558 F.3d 856. It is the position of this paper that rather than concurrent power, Congress intended the states to have complimentary power. See *infra* Part IV. Prior to IRCA, sanctioning employers for employing unauthorized aliens was within the states' police powers. *Id.* at 1041. See also *DeCanas v. Bica*, 424 U.S. 351 (1976).

Congress decided to encourage cooperation among all levels of government in immigration.⁵⁵ Whereas IRCA specifically preempted nearly all state laws designed to combat illegal immigration in a similar way to IRCA, IIRIRA recognized cooperation as a necessary tool in combating illegal immigration.⁵⁶ The upshot of IIRIRA's expansion of federal-state cooperation is that it shows Congress's intent to achieve its goals through the most efficient means possible.⁵⁷ IIRIRA shows that, in the immigration context, Congress believes those means to be as inclusive as possible, "encompass[ing] federal, state[,] and local resources, skills and expertise."⁵⁸

D. *The Legal Arizona Workers Act*

Despite its ambitious goals, IRCA has not been successful in combating illegal immigration.⁵⁹ In response to this alleged failure, the Arizona legislature enacted the Legal Arizona Workers Act in July 2007.⁶⁰ The Act allows the superior court to suspend or revoke the

55. Fact Sheet: Section 287(g) Immigration and Nationality Act, (U.S. Customs and Immigration Enforcement August 16, 2006), *available at* <http://www.ice.gov/doclib/pi/news/factsheets/060816dc287gfactsheet.pdf>. With the passage of IIRIRA, Congress added section 287(g) to the Immigration and Nationality Act. *Id.* In so doing, it authorizes the executive branch (now through the Department of Homeland Security) "to enter into agreements with state and local law enforcement agencies" which permitted state and local officers to perform certain functions of immigration law enforcement. *Id.* Currently, at least five state agencies have entered into such agreements (Florida, Alabama, Arizona, North Carolina, and California). *Id.* at 2.

56. *See id.* Specifically, section 287(g) of the Immigration and Nationality Act allows the Secretary of Homeland Security to delegate limited immigration authority to state and local officers, provided those officers receive proper training and are under the supervision of federal Immigration and Customs Enforcement officers. *Id.* at 1. The officers selected must be citizens of the United States, have background checks, at least two years experience, and no pending disciplinary actions. *Id.* at 3. The training is four weeks for correctional officers and five weeks for "field level" officers, with standards and testing set by U.S. Immigration and Customs Enforcement. *Id.* at 3. The connectivity advocated under IIRIRA is especially important in more remote areas with limited regular federal presence. *Id.* at 1.

57. *See id.* Another example of Congress working toward cooperative efficiency can be found in the Clean Air Act, which allows states to implement individual plans to meet federally set National Ambient Air Quality Standards. 42 U.S.C. § 7410.

58. Fact Sheet, *supra* note 55. The savings clause in IRCA's preemption provision perhaps foreshadows this desire for cooperative efforts. *See* 8 U.S.C. § 1324a(h)(2).

59. *Ariz. Contractors Ass'n v. Napolitano* (*Ariz. Contractors I*), 526 F. Supp. 2d 968, 973 (D. Ariz. 2007). ("Current immigration laws are severely flawed and have failed to curb the flow of undocumented workers into the U.S."). *See also* Letter from Janet Napolitano to Jim Weiers, *supra* note 1 (this is Governor Napolitano's Signing Statement for the Legal Arizona Workers Act).

60. *See id.* The statute is ARIZ. REV. STAT. ANN. §§ 23-211 to -216 (2008). There was a similar bill passed the previous year, which Governor Napolitano vetoed because it included the

business licenses of employers who knowingly or intentionally hire unauthorized workers.⁶¹ The Act also makes use of the E-Verify system mandatory.⁶² Frustrated with the failure of the federal government to comprehensively reform immigration law, the Arizona legislature responded in the only way it could under IRCA, by implementing a licensing law.⁶³

III. STATEMENT OF THE CASE

A. *Statement of Facts*

In July 2007, the Arizona legislature enacted the Legal Arizona Workers Act.⁶⁴ The Act was directed at employers of illegal immigrants.⁶⁵ Two aspects of the Act are at issue in *Chicanos Por La Causa*.⁶⁶ The first aspect is its enforcement provisions.⁶⁷ These provisions allow the revocation of an employer's business license if the business is found to knowingly or intentionally employ illegal aliens.⁶⁸ The second provision mandates the use of an electronic verification

possibility of "amnesty and indemnification" for employers. *See* Letter from Janet Napolitano to Jim Weiers, *supra* note 1.

61. §§ 23-212(F), 23-212.01(F) (2008). For intentionally employing unauthorized aliens, licenses must be suspended for a minimum of ten days, with the maximum under the discretion of the court for first-time offenders. § 23-212.01(F)(1)(C). For a second violation, all licenses at places where unauthorized aliens worked are revoked. § 23-212.01(F)(2). For knowingly employing unauthorized aliens, the suspension of licenses is completely discretionary; however, second-offense revocation is not. §§ 23-212(F)(1)(d), 23-212(F)(2).

62. § 23-214 (2008). *See infra* note 69 and accompanying text.

63. *See* Letter from Janet Napolitano to Jim Weiers, *supra* note 1. In her signing statement, Governor Napolitano admitted that immigration was "a federal responsibility," but that it was "abundantly clear" that Congress was unable to provide the necessary, comprehensive reforms. *Id.* at 1. The Governor then described all of the bill's weaknesses, including the lack of an exemption for vital industries like hospitals. *Id.* at 1-2.

64. 2007 Ariz. Sess. Laws Ch. 279. *See also* *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 862 (9th Cir. 2008).

65. *Chicanos Por La Causa*, 558 F.3d at 860. *See* §§ 23-211 to -216. These are the statutory sections that make up the Legal Arizona Workers Act.

66. *Chicanos Por La Causa*, 558 F.3d at 860-61.

67. §§ 23-212(F), 23-212.01(F). Section 23-212 addresses "knowing" employment of illegal immigrants, Section 23-212.01 addresses "intentional" employment. §§ 23-212, 23-212.01. The enforcement provisions are similar, but a violation of Section 23-212.01 carries more stringent penalties. § 23-212.01(F). Under that section, the probationary period is extended by two years. §23-212.01(F)(1)(b). The section also requires courts to suspend the offending employer's business license. §23-212.01(F)(1)(c). For "knowing" violations under Section 23-212, the suspension of licenses is not mandatory. §23-212(F)(1)(d). As of the Ninth Circuit's opinion in March 2009, the Act had not been enforced against any employer. *Chicanos Por La Causa*, 558 F.3d at 860.

68. §§ 23-212(F), 23-212.01(F).

system developed by the federal government.⁶⁹ Shortly after the Act's enactment, businesses and civil rights groups began filing lawsuits challenging the Act's constitutionality.⁷⁰

B. Procedural History

After the initial lawsuits were dismissed for lack of subject matter jurisdiction, the plaintiffs refiled the case, with additional plaintiffs and different defendants.⁷¹ The parties agreed to hold a preliminary injunction hearing and a trial on the merits, both of which were held on the same day.⁷² The plaintiffs alleged that federal law expressly and impliedly preempted the Act.⁷³ They further contended the Act is

69. § 23-214. Utilization of this system, known as E-Verify, is voluntary under federal law. *Chicanos Por La Causa*, 558 F.3d at 860. See *supra* notes 46-51 and accompanying text.

70. *Ariz. Contractors Ass'n v. Candelaria (Ariz. Contractors II)*, 534 F. Supp. 2d 1036, 1040-1041 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa*, 558 F.3d 856 (9th Cir. 2008). The district court ruled on consolidated cases. *Id.* Many more were consolidated when the case went to the Ninth Circuit. *Id.* In fact, the plaintiffs filed initial actions on July 13, 2007, a mere eleven days after the governor signed the Act. Consolidated Opening Brief for Plaintiff/Appellant, *supra* note 28, at 3.

71. *Ariz. Contractors II*, 534 F. Supp. 2d at 1040-41. See also *Ariz. Contractors Ass'n v. Napolitano (Ariz. Contractors I)*, 526 F. Supp. 2d 968 (D. Ariz. 2007). The United States District Court for the District of Arizona dismissed the initial lawsuits for lack of subject matter jurisdiction, because the plaintiffs had not named the proper defendants. *Ariz. Contractors II*, 534 F. Supp. 2d at 1041. See also *Ariz. Contractors I*, 526 F. Supp. 2d 968. The plaintiffs failed to name the county attorneys, who are responsible for enforcing the Act as defendants. *Chicanos Por La Causa*, 558 F.3d at 862-63. The District Court ruled that the defendants in *Arizona Contractors I*, the Governor, Attorney General, and Director of the Department of Revenue of Arizona, were not the correct defendants because only county attorneys could enforce the Act. *Ariz. Contractors I*, 526 F. Supp. 2d at 983. The district court dismissed the case against the governor and director of the Department of Revenue because neither caused, or had the ability to cause, the plaintiff's injury. *Id.* The district court dismissed the case against the Attorney General because he had not referred any employer to a county attorney for investigation or enforcement nor had he made any threats of enforcement on his own. *Id.* It is also questionable here whether, because the Act would not take effect until January 2008 (although enacted in July 2007), there existed a case or controversy, as is required for subject matter jurisdiction. U.S. CONST. art. III, § 2, cl. 1; *Ariz. Contractors II*, 534 F. Supp. 2d at 1040. The plaintiffs seem to be relying on the rather thin justification of economic loss for the amount of money they would have to spend to comply with the E-Verify requirement. *Ariz. Contractors II*, 534 F. Supp. 2d at 1043. The defendants did not challenge Plaintiffs' standing per stipulation but reserved the right to raise the issue on appeal. *Id.* at 1041 (mentioning the stipulation and reservation).

72. *Id.*

73. *Chicanos Por La Causa*, 558 F.3d at 863. The express preemption claim revolves around the Immigration Reform and Control Act of 1986 ("IRCA"). *Id.* The preemption section of IRCA states: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. §1324a(h)(2). The implied preemption argument concerns the provision of the Act making usage of the E-Verify system mandatory.

unconstitutional because it deprives employers of a chance to be meaningfully heard before the State can revoke their licenses.⁷⁴ The district court rejected all of the plaintiffs' arguments, denied their request for a preliminary injunction, and dismissed the case.⁷⁵ The plaintiffs then appealed to the Ninth Circuit Court of Appeals.⁷⁶

C. *Competing Arguments*

1. Preemption

Under the Supremacy Clause of the Constitution, federal statutes preempt state statutes.⁷⁷ Absent a specific provision, the determination of whether a state law is preempted turns on congressional intent.⁷⁸ In

Chicanos Por La Causa, 558 F.3d at 863. The plaintiffs argue that making use mandatory is contrary to Congress' intent that it be voluntary. *Ariz. Contractors II*, 534 F. Supp. 2d at 1055-56.

74. *Chicanos Por La Causa*, 558 F.3d at 868. The states are bound by the Fourteenth Amendment to the U.S. Constitution not to deprive anyone of property without due process. U.S. CONST. amend. XIV, § 1.

75. *Ariz. Contractors II*, 534 F. Supp. 2d at 1061. In the initial case, Plaintiffs also alleged violations of the Fourth Amendment and Commerce Clause of the U.S. Constitution and the Arizona Constitution's separation of powers. *Id.* The plaintiffs based the separation of powers claim on the theory that the legislature illegally "dictate[d] the method by which the Executive Branch of government shall investigate." Second Amended Complaint at ¶ 204, *Arizona Contractors Ass'n, Inc. v. Napolitano*, 526 F. Supp. 2d 968 (D. Ariz. 2007) (Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW). The theory is that because the executive branch is charged with enforcement, the legislature could not tell the executive branch how to do its job by exercising de facto enforcement powers under the Arizona Constitution. *Id.* at ¶¶ 208-09. Plaintiffs based the Fourth Amendment argument on the fact that the Act makes E-Verify mandatory. *Id.* at ¶¶ 216-18. Employers who use E-Verify agree to allow "authorized agents to make periodic visits to the employers, to review Basic Pilot-related records, to interview employees of the employer, and to inspect other employment records." *Id.* at ¶ 216. In so doing, Plaintiffs argued, Arizona forces them to waive their Fourth Amendment protection against unreasonable searches and seizures. *Id.* at ¶ 218. The plaintiffs dropped the Fourth Amendment and separation of powers claims by stipulation. *Ariz. Contractors II*, 534 F. Supp. 2d at 1061. The Commerce Clause argument was raised because the Act's definition of "employee" was not limited to employees hired or working within Arizona. Second Amended Complaint at ¶¶ 122-32. The district court rejected the Commerce Clause argument because "the Act does not regulate employees completely outside of the State." *Ariz. Contractors II*, 534 F. Supp. 2d at 1061. The Commerce Clause claim does not appear to have been raised on appeal. See *Chicanos Por La Causa*, 558 F.3d 856.

76. *Chicanos Por La Causa*, 558 F.3d 856.

77. U.S. CONST. art. VI, cl. 2. See also *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) ("The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'") (emphasis added).

78. See *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88 (1992). This case discusses the three types of preemption, all of which are at issue in the present case. *Gade*, 505 U.S. at 98. The three types of preemption include: (1) field preemption where the federal regulatory plan is "so pervasive . . . that Congress left no room for the States to supplement it," (2) conflict pre-

IRCA, while preempting the vast majority of state laws, Congress explicitly carved out an important exception for “licensing and similar laws.”⁷⁹ Thus, if the Legal Arizona Workers Act is a licensing law as Arizona contends, IRCA does not expressly preempt it.⁸⁰ The Act could still be impliedly preempted, however, based upon an examination of IRCA’s “structure and purpose.”⁸¹ Generally, absent “clear and manifest” congressional intent, a presumption exists that the state law is not preempted.⁸²

The plaintiffs alleged that IRCA expressly preempts the Act.⁸³ Specifically, IRCA expressly preempts any state law that imposes “civil or criminal sanctions” against employers or recruiters of illegal immigrants, except “licensing and similar laws.”⁸⁴ The principal IRCA-based preemption issue in this case is whether IRCA’s licensing exemption covers the Act.⁸⁵ The plaintiffs contended that the Act is not a licensing or similar law within IRCA’s meaning and that Congress did not intend the licensing law exception to allow a state to create its own enforcement system independent of IRCA.⁸⁶ The gist of the plaintiffs’ argument was that some of the documents defined as “licenses” under

emption where the state law frustrates the purposes of Congress or where compliance with both laws is impossible, and (3) express preemption where Congress has explicitly preempted State laws in its statute. *Id.*

79. See 8 U.S.C. § 1324a(h)(2) (1996). See *supra* note 53. The exception for licensing and similar laws is referred to as the “savings clause.” *Chicanos Por La Causa*, 558 F.3d at 861. A “saving clause” (sometimes “savings clause”) is a statutory provision that carves out an exception from the statute’s mandate for something that would normally fall within the statute’s scope. BLACK’S LAW DICTIONARY 1371 (8th ed. 2004). Savings clauses are usually used “to preserve rights and claims that would otherwise be lost.” *Id.* According to the House Report on IRCA:

The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or “fitness to do business laws,” such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. REP. NO. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

80. 8 U.S.C. § 1324a(h)(2).

81. *Gade*, 505 U.S. at 98 (differentiating between express and implied preemption).

82. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). This assumption applies in all cases involving federal legislation in areas traditionally within the police powers of the state. *Id.* at 485.

83. *Chicanos Por La Causa*, 558 F.3d at 863. See *supra* note 73.

84. 8 U.S.C. §1324a(h)(2). See also *supra* note 73.

85. *Chicanos Por La Causa*, 558 F. 3d at 863-64. For the Act’s enforcement provisions, see ARIZ. REV. STAT. ANN. §§ 23-212(F), 23-212.01(F) (2008).

86. *Chicanos Por La Causa*, 558 F.3d at 864.

the statute are not “licenses” within the generally accepted meaning of that term.⁸⁷ The plaintiffs also argued for a narrow interpretation of the “licensing and similar laws” phrase to prevent state usurpation of federal authority.⁸⁸

Arizona argued that the plain language of the Act’s enforcement provision shows it to be a licensing law.⁸⁹ The district court agreed, saying the provision merely imposes conditions on state business licenses.⁹⁰ The plaintiffs countered with an argument that Congress meant “license” to apply only to certain professions, such as medicine and law, and not to businesses.⁹¹ Arizona argued that “license,” both in IRCA and the Act, means what it has always meant: “permission, usually revocable, to commit some act that would otherwise be unlawful.”⁹² The plaintiffs claimed Congress intended the savings clause to allow state sanctions only after a determination by the federal government that an employer hired illegal immigrants.⁹³ In reply, Arizona asserted that Congress specifically intended to allow the continuation of state regulation.⁹⁴ The plaintiffs’ final express preemption argument was that the Act should be preempted because it might conflict with federal law when applied.⁹⁵

87. *Id.* at 865. The statute defines “license” as:

[A]ny agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state. Includes: (i) Articles of incorporation under title 10, (ii) a certificate of partnership, a partnership registration[,] or articles of organization under title 29, (iii) a grant of authority issued under title 10, chapter 15, [or] (iv) any transaction privilege license.

§ 23-211(9)(a),(b).

88. *Ariz. Contractors Ass’n v. Candelaria (Ariz. Contractors II)*, 534 F. Supp. 2d 1036, 1049 (D. Ariz. 2008), *aff’d sub nom. Chicanos Por La Causa*, 558 F.3d 856. The district court rejected this argument because licensing is traditionally an area of state control. *Id.* at 1050-51. When Congress legislates in an area traditionally controlled by the states, there is a presumption of non-preemption that can only be overcome by a “clear and manifest purpose” of superseding state law. *Id.* at 1044. See *DeCanas v. Bica*, 424 U.S. 351 (1976). For a discussion of savings clauses, see *supra* note 79.

89. *Ariz. Contractors II*, 534 F. Supp. 2d at 1045-46.

90. See *Ariz. Contractors II*, 534 F. Supp. 2d at 1046. The district court also found that “[t]he Act’s definition of license does not depart from common sense or traditional understandings of what is a license.” *Id.*

91. *Chicanos Por La Causa*, 558 F.3d at 865. The Arizona Act expressly excludes professional licenses. § 23-211(9)(c)(ii).

92. *Ariz. Contractors II*, 534 F. Supp. 2d at 1046. For the statutory definition under the Act, see § 23-211(9)(a). See also *supra* note 87.

93. *Ariz. Contractors II*, 534 F. Supp. 2d at 1050-51.

94. *Id.* at 1051 (relying on *DeCanas*, 424 U.S. 351).

95. *Chicanos Por La Causa*, 558 F.3d at 866. The trouble with this argument is that Plaintiffs only provide the court with one example of when this might happen. *Id.* Not only has this not

The plaintiffs argued that even if federal law does not expressly preempt the Act, it is implicitly preempted.⁹⁶ This argument specifically addressed the Act's mandated use of the E-Verify system.⁹⁷ The plaintiffs contended that because Congress made use of the system voluntary, Arizona does not have the authority to require it.⁹⁸ Arizona argued that Congress's intent was to encourage use of E-Verify, and that there was nothing that precluded a state from making it mandatory.⁹⁹

2. Due Process

In addition to the preemption claim, the plaintiffs also contended that the Act violates employers' due process rights by not allowing them to be heard prior to the State revoking their licenses.¹⁰⁰ The Act does provide for a hearing before the court can impose sanctions; however, the plaintiffs considered the hearing meaningless.¹⁰¹ The plaintiffs contended the plain language of the statute, which allows the superior court to consider "only the federal government's determination" of whether an employee is an unauthorized alien, prevents employers from challenging that determination.¹⁰²

Arizona argued that the plaintiffs focused on just the first sentence of Section 23-212(H).¹⁰³ Read with the second sentence, the defendants contended, it is clear that this federal determination creates a rebuttable presumption that an employee is unauthorized.¹⁰⁴ According to Arizona,

actually happened, there is no indication that it will happen. *Id.* See also *infra* notes 123, 237-38 and accompanying text.

96. *Ariz. Contractors II*, 534 F. Supp. 2d at 1055-56.

97. *Id.* See *supra* note 69 and accompanying text.

98. *Ariz. Contractors II*, 534 F. Supp. 2d at 1055-56.

99. *Id.* Indeed, E-Verify is now the federal government's preferred employment verification system. See *supra* note 47 and accompanying text.

100. Consolidated Opening Brief for Plaintiff/Appellant, *supra* note 28, at 53-55. For purposes of due process, both sides agree that a business license is a property interest that cannot be taken without due process. Consolidated Reply Brief for Plaintiff/Appellant at 18, *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2008) (Nos. 07-17272, 07-17274, 08-15357, 08-15359, 08-15360), 2008 WL 2442250. See also Answer Brief for Defendant/Appellee, *supra* note 47, at 43.

101. Consolidated Opening Brief for Plaintiff/Appellant, *supra* note 28, at 54.

102. Consolidated Opening Brief for Plaintiff/Appellant, *supra* note 28, at 54-55. For the statutory language at issue, see § 23-212(H) (2008).

103. Answer Brief for Defendant/Appellee, *supra* note 47, at 44. The first sentence of ARIZ. REV. STAT. ANN. § 23-212(H) says "[o]n determining whether an employee is an unauthorized alien, the court shall consider *only* the federal government's determination pursuant to 8 United States Code § 1373(c)" (emphasis added).

104. Answer Brief for Defendant/Appellee, *supra* note 47, at 44. See also Consolidated Reply Brief for Plaintiff/Appellant, *supra* note 100, at 18-19. The second sentence of § 23-212(H) says

this presumption can be challenged at a hearing in the superior court prior to the imposition of sanctions.¹⁰⁵ The Act, they argue, does not violate due process because employers have sufficient opportunity to be heard “in a meaningful manner.”¹⁰⁶

D. *The Ninth Circuit Court of Appeals’ Decision*

The Ninth Circuit Court of Appeals found that the Act is a licensing law within the meaning of the savings clause of IRCA’s preemption provision.¹⁰⁷ The court found that employment was traditionally regulated by the states.¹⁰⁸ According to the court, a presumption of non-preemption applies when Congress passes laws affecting traditionally state-regulated areas.¹⁰⁹ Given this presumption and the traditional definition of license, the court concluded that the Act fell within the savings clause.¹¹⁰ The court then disregarded the plaintiffs’ conflict preemption challenge, noting that a potential conflict with federal law is

“The federal government’s determination creates a rebuttable presumption of the employee’s lawful status.”

105. Answer Brief for Defendant/Appellee, *supra* note 100, at 45. See § 23-212(C), (D), (E) (2008). See also § 23-212.01 (C), (D), (E) (2008).

106. Answer Brief for Defendant/Appellee, *supra* note 100, at 42 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)).

107. *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 860 (9th Cir. 2008).

108. *Id.* at 864. The case the court relies on for the proposition that employment of illegal immigrants is a state-regulated area is *DeCanas v. Bica*, 424 U.S. 351 (1976). See *Chicanos Por La Causa v. Napolitano*, 544 F.3d 976, 984 (9th Cir. 2008). See also *supra* note 54 and accompanying text. In *DeCanas*, immigrant migrant farm laborers sued farm labor contractors alleging that the contractors refused them employment because of a surplus of labor. *DeCanas*, 424 U.S. at 353. The plaintiffs alleged that the surplus resulted from the knowing employment of unauthorized aliens, which violated a California statute. *Id.* California’s lower courts found that it was preempted by federal law, specifically the Immigration and Nationality Act. *Id.* The California Supreme Court refused to hear the case; the United States Supreme Court then granted certiorari. *Id.* at 354. The Supreme Court reversed, finding that Congress did not intend to pre-empt “harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular.” *Id.* at 358. Most importantly, however, the Court held that states can enact such regulation under their traditional police powers. *Id.* at 356-57. Despite IRCA’s reformation of federal immigration policy, the circuit court found in *Chicanos Por La Causa* that *DeCanas*’ holding still controls. *Chicanos Por La Causa*, 544 F.3d at 984. The court’s reasoning was that although IRCA made employment of unauthorized aliens central to federal immigration policy, the power to regulate that employment “remains within the states’ historic police powers . . .” *Id.* See also *supra* note 30.

109. *Chicanos Por La Causa*, 544 F.3d at 979.

110. *Chicanos Por La Causa*, 558 F.3d at 856. The court also looked at the legislative history of IRCA, quoting language from House Report 99-682, which seems to eviscerate Plaintiffs’ express preemption argument. *Id.* at 865 (discussing House Report 99-682). The quoted language says, in part: “the Committee does not intend to preempt licensing or “fitness to do business laws,” . . . which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.” *Id.*

insufficient to maintain a facial attack on the Act's constitutionality, because a facial challenge to a statute under conflict preemption requires an *actual* conflict rather than a speculative one.¹¹¹ Next, the court rejected the plaintiffs' implied preemption argument, stating that Congress's intent is to encourage use of E-Verify.¹¹² The Act, according to the court, merely furthers that purpose.¹¹³ A state law that furthers Congress's purpose is not conflict preempted.¹¹⁴ Plaintiffs made one last conflict preemption argument based upon the "potentially discriminatory effects" of E-Verify.¹¹⁵ The court rejected this argument because the plaintiffs failed to show that E-Verify is more discriminatory than the other options Congress has provided for employment verification.¹¹⁶

The court then turned to the plaintiffs' due process claim.¹¹⁷ The Act, the court found, provides employers with a chance to present evidence at a hearing.¹¹⁸ The court suggested that the superior court's reliance on "only" a federal determination of an employee's status protects employees from State investigation.¹¹⁹ The court found that an employer's opportunity to give evidence to rebut the presumption that an employee is unauthorized satisfies due process.¹²⁰

The circuit court affirmed the judgment of the district court, upholding the Act "in all respects."¹²¹ However, the court was careful to note that its ruling only applies to facial challenges of the Act's

111. *Id.* at 866.

112. *Id.* at 867. Congress could have prohibited states from making participation in E-Verify mandatory but did not do so. *Id.* at 866-67.

113. *Id.* at 867. According to the court, Congress impliedly encourages use of E-Verify through an expansion of its availability. *Id.*

114. *Id.* "The Act's requirement that employers participate in E-Verify is consistent with and furthers [Congress's] purpose, and thus does not raise conflict preemption concerns." *Id.*

115. *Id.*

116. *Id.* Because verification is required anyway, through either E-Verify or the I-9 system, Plaintiffs were required to show E-Verify leads to more discrimination than I-9 in order for E-Verify to be conflict preempted. *Id.*

117. *Id.* at 867-69. The taking away of a property interest has to be preceded by notice and a chance to be heard. *Id.* at 867. Plaintiffs argue that the statute deprives them of this opportunity. *Id.* at 868.

118. *Id.* (finding that employers have a chance to present evidence before the superior court).

119. *Id.* at 868-69. Arizona's attorneys and the court seem to be theorizing here rather than providing concrete evidence as to legislative intent. *See id.* *See* ARIZ. REV. STAT. ANN. § 23-212(H) (2008) (directing the superior court to look only to the federal government's determination of status).

120. *Chicanos Por La Causa*, 558 F.3d at 869. The proceeding where they can present rebuttal evidence is the "opportunity to be heard" that Plaintiffs feel the statute extinguishes. *Id.* at 868. *See supra* note 117 and accompanying text.

121. *Chicanos Por La Causa*, 558 F.3d at 861.

constitutionality.¹²² In doing so, the court appears to have reservations about the Act's application.¹²³

IV. ANALYSIS

Despite the criticisms heaped on the Legal Arizona Workers Act, from both business groups and immigrants' rights groups, its benefits far outweigh the issues raised by these criticisms.¹²⁴ Not only does the law place the proper burdens where they belong, it also has an opportunity to lead to widespread benefits for all parties involved.¹²⁵ In the plaintiffs' haste to have the law overturned as unconstitutional, they have failed to recognize this possibility.¹²⁶ By upholding the Act, the Ninth Circuit's decision allows Arizona to explore the potential of State enforcement in immigration law—a field in which federal law has failed miserably.¹²⁷

122. *Id.* The court is concerned enough about the potential application problems to make this explicitly clear very early in the opinion. *Id.*

123. *Id.* (“[W]e must observe that [this facial challenge] is brought against a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision.”). *See also infra* notes 237-238 and accompanying text. The plaintiffs' burden of persuasion to sustain a facial challenge to a statute is significantly greater than the burden of sustaining other types of challenges. *Chicanos Por La Causa*, 558 F.3d at 861.

124. One indication that both businesses and immigrants' rights groups oppose the legislation is that both are among the various parties to the lawsuit challenging its constitutionality. *See id.* Plaintiffs include *Chicanos Por La Causa* and *Somos America*, groups working to promote immigrants' rights. *See id.* On the other hand, Plaintiffs also include many business groups such as Arizona Employers for Immigration Reform, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, Wake Up Arizona! Inc., Arizona Landscape Contractors' Association, and Arizona Contractors Association. *See id.* The criticisms are documented, albeit one-sidedly, on Wake Up Arizona!'s website. Wake Up Arizona!, *About the Coalition*, http://www.wakeuparizona.org/?page_id=19 (last visited July 26, 2009).

125. *See* Letter from Janet Napolitano to Jim Weiers, *supra* note 1. These potential benefits will be discussed in depth later in the analysis.

126. *See* *Ariz. Contractors Ass'n v. Napolitano (Ariz. Contractors I)*, 526 F. Supp. 2d 968 (D. Ariz. 2007). “Haste” may be putting it mildly, as the first lawsuits were filed less than two weeks after the law was signed by Governor Napolitano. Consolidated Opening Brief for Plaintiff/Appellant, *supra* note 28, at 53-55. *See* *Ariz. Contractors Ass'n v. Candelaria (Ariz. Contractors II)*, 534 F. Supp. 2d 1036, 1049 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa*, 558 F.3d 856 (9th Cir. 2008).

127. Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 1. Further evidence of Congress' failure is evident due to the fact that illegal immigration is still such an important, divisive issue over twenty years after IRCA's enactment. 8 U.S.C. §§ 1324a to 1324c (1996).

A. *The Burden on Employers*

The government, whether at the federal or state level, is not in the best position to determine whether potential employees are authorized to legally work in the United States.¹²⁸ The reason is simple: the government is not the entity hiring these employees and does not have the access or the resources necessary to screen every candidate for employment at every business.¹²⁹ By placing the burden on employers the Act is hardly breaking novel ground; employers are already responsible for their employees in various ways.¹³⁰ The policy underlying this concept is that employers are in the best position to anticipate and, if necessary, control the actions of persons in their employ.¹³¹ These same principles are rightfully implicated when an

128. This position is analogous to the “least cost avoider” that shows up from time-to-time in other areas of law. *See e.g.*, *Holtz v. J.J.B. Hilliard W.L. Lyons, Inc.*, 185 F.3d 732, 743 (7th Cir. 1999) (applying “least cost avoider” rationale to contract law); *Rankin v. City of Wichita Falls*, 762 F.2d 444, 448 n.4 (5th Cir. 1985) (explaining the principle’s importance to modern tort law). The idea is that the party who can solve the problem at the lowest cost should have the burden of doing so. *See Holtz*, 185 F.3d at 743. *Cf.* Press Release, American Society of Safety Engineers, American Society of Safety Engineers Comment on Employer Payment for Personal Protection Equipment (August 31, 2004), available at <http://www.asse.org/newsroom/releases/press401.htm> (arguing that the government should not establish regulations requiring specific personal protection equipment in specific industries because “employers . . . are in the best position to identify and select the correct equipment and to maintain it properly”).

129. *Cf.* *Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris (Arizona Governing Committee)*, 463 U.S. 1073 (1983). Although *Arizona Governing Committee* was in a different context (a Title VII sexual harassment claim), the Supreme Court made it clear that “employers are ultimately responsible for the ‘compensation, terms, conditions, [and] privileges of employment’ provided to employees” *Id.* at 1089 (quoting 42 U.S.C. § 2000e-2(a)(1)). *See also* Ann K. Wooster, Annotation, *Title VII Sex Discrimination in Employment — Supreme Court Cases*, 170 A.L.R. FED. 219 (2001). It follows therefore that the government does not bear such responsibility for the employees of non-governmental entities.

130. Employer responsibility for employees extends to include health care law, agency law, tort law, and many other areas of law. *See, e.g.*, *Nell Jean Industries, Inc. v. Barnhart*, 224 F. Supp. 2d 10 (D.D.C. 2002). In *Nell Jean Industries*, the court examined the legislative history of the Coal Industry Retiree Health Benefit Act of 1992 (“Coal Act”). *Nell Jean Industries*, 224 F. Supp. 2d at 24. The court found that Congress’s purpose in passing the Coal Act was to make employers responsible for funding health care benefits for their former employees. *See also* 26 U.S.C.A. §§ 9701 to 9722. *See, e.g.*, 3 Am. Jur. 2d *Agency* § 2 (1986). In agency law, an employer (principal) is bound by any contracts entered into by the employee-agent on the principal’s behalf. *Id.* This is sometimes true even when the employee-agent lacks the actual authority to bind the employer (principal). Restatement (Third) of *Agency* § 2.03 (2006). *See also* 3 Am. Jur. 2d *Agency* § 17 (1986). In tort law, an employer is often responsible for the tortious conduct of his/her employees. Restatement (Third) of *Torts: Liab. Physical Harm* 4 SC NT (P.F.D. No. 1, 2005). *See also* Restatement (Third) of *Agency* § 2.04 (2006).

131. *See Smith v. Sears, Roebuck, and Co.*, 276 F. Supp. 2d 603, 609. (S.D. Miss. 2003); *Bundy v. Jackson*, 641 F. 2d 934 (D.C. Cir. 1981) (finding employer liable because employer “was in the best position to correct” the sexual harassment offenses of an employee). *Id.* at 943 n.8.

employer or potential employer bears responsibility for her employees or prospective employees.¹³² There is no question that companies hiring new employees in Arizona are in a far better position than the government to assess the legal status of their new hires, not least because the employers, or their agents, often personally meet them.¹³³

One of the reasons Congress passed IRCA in 1986 was because most illegal immigrants come to the United States to find jobs.¹³⁴ Congress thought it “essential” that employers take responsibility for the people they hire.¹³⁵ With the Act, Arizona is simply agreeing with Congress.¹³⁶ If demand for low-cost, effective labor diminishes, it is very likely that the flow of undocumented aliens into the United States will slow considerably.¹³⁷

One of the issues employers raised with regard to the Act was the cost of compliance, specifically the cost of enrolling and participating in the E-Verify system.¹³⁸ These costs include labor, equipment, and other expenses.¹³⁹ Although the district court found in the initially filed cases that the cost of compliance was quite modest, the judge determined in

132. See *supra* note 131.

133. See Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 1. In fact, one of the reasons the Arizona legislature approved the Legal Arizona Workers Act was because there was a “constant demand” among employers for “cheap, undocumented labor.” *Id.*

134. H.R. REP. No. 99-682(I), at 47 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5651.

135. *Id.* (“Since most undocumented aliens enter this country to find jobs, the Committee believes it is essential to require employers to share the responsibility to address this serious problem.”). Congress likely would not have done so if it thought employers would not be helpful. See H.R. REP. No. 99-682(I). For Congress, the problem of illegal immigration was especially urgent in harsh economic times. *Id.* at 47.

136. See Letter from Janet Napolitano to Jim Weiers, *supra* note 1. H.R. REP. No. 99-682(I) at 47.

137. H.R. REP. No. 99-682(I) at 47. The question has always been *how* to lower that demand. *Id.* This was the whole premise behind IRCA in 1986 and remains the policy behind employer sanctioning today. See President’s Statement on Signing the Immigration Reform and Control Act of 1986 (S. 1200), 22 Weekly Comp. Pres. Doc. 1534 (Nov. 10, 1986). See also Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 1.

138. *Ariz. Contractors Ass’n v. Napolitano (Ariz. Contractors I)*, 526 F. Supp. 2d 968 (D. Ariz. 2007). This cost, in fact, was the only injury the district court agreed gave the plaintiffs standing to challenge the constitutionality of the Act. See *id.* Even without threatened enforcement, plaintiffs do sometimes have standing to challenge statutes that have yet to take effect. See *Lake Carriers’ Ass’n v. MacMullan*, 406 U.S. 498, 507-08 (1972) (holding that the cost of compliance with a statute that is about to take effect satisfies the requirements of standing). See *infra* note 140-143.

139. *Ariz. Contractors I*, 526 F. Supp. 2d at 974, 979. Compliance is more expensive for some employers than others. *Id.* at 974. There are at least two likely reasons for this. First, large companies hire more employees and would have to expend more resources verifying their legal status. Second, small companies might not have had adequate equipment to comply prior to the Act’s enactment. See *id.* (discussing these costs).

the subsequent lawsuit that he had overestimated that cost.¹⁴⁰ The revised average implementation cost was found to be \$125, with the vast majority of employers spending under \$100.¹⁴¹ The average yearly estimate was lowered to \$728, with three-fourths of employers spending under \$100.¹⁴² The low implementation and operating costs for the vast majority of employers significantly minimize the negative effect of the mandatory E-Verify requirement on employers.¹⁴³

B. *The Rebirth of Federalism in Immigration Law*

1. Preemption, IRCA's Saving Clause, and Legislative History

The passage of the Immigration Reform and Control Act of 1986 placed federal law firmly at the forefront of national immigration policy.¹⁴⁴ Prior to IRCA, the states performed many enforcement functions as far as immigration was concerned.¹⁴⁵ For the most part, IRCA preempted all state laws that sanctioned employers for employing unauthorized aliens.¹⁴⁶ However, licensing laws are specifically exempted from preemption.¹⁴⁷ This exemption gave Arizona the

140. *Ariz. Contractors Ass'n v. Candelaria (Ariz. Contractors II)*, 534 F. Supp. 2d 1036, 1049 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa*, 558 F.3d 856 (9th Cir. 2008). In the original case, the court found the majority of employers spent less than five hundred dollars to implement the E-Verify system. *Ariz. Contractors I*, 526 F. Supp. 2d at 974. The court also found that most employers also spent under five hundred dollars per year to use the system. *Id.* The average yearly operating cost was \$1800, and nearly 85 percent of employers spent under \$3500. *Id.* In the subsequent decision, the court revised its estimates. *Ariz. Contractors II*, 534 F. Supp. 2d at 1042-43. These lower estimates were still enough to give Plaintiffs standing to challenge the Act. *Id.* See also *supra* note 138.

141. *Ariz. Contractors II*, 534 F. Supp. 2d at 1043.

142. *Id.*

143. *Id.* at 1042-43. Although the actual operation does not change simply because the cost is less, the requirement's economic hit to employers amounts to a minor business expense. See *id.* At most, the financial considerations are nothing more than a nuisance.

144. See *supra* note 30 and accompanying text.

145. See *DeCanas v. Bica*, 424 U.S. 351, 354-59 (1976) (holding that although the regulation of immigration was a power exclusive to the federal government, states could implement and enforce their own immigration laws so long as they did not conflict with federal laws).

146. 8 U.S.C. § 1324a(h)(2) (1996). See also *supra* note 53 and accompanying text. Among the advantages of federal preemption is uniformity, both of the law and citizens' expectations of the law. See H.R. REP. NO. 99-682(I), at 56 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5660. The main reason that state laws were not preempted prior to IRCA was not because the advantages of uniformity were not recognized but because Congress had not expressed an intent to preempt state law. *DeCanas*, 424 U.S. at 357-59.

147. 8 U.S.C. § 1324a(h)(2). "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2)

opening it needed to augment IRCA with the Legal Arizona Workers Act.¹⁴⁸ Arizona's legislature has enacted a licensing law.¹⁴⁹ The sanctions that can be levied against employers under the Act are sanctions "through licensing and similar laws" because all Arizona is doing is deciding who can and who cannot do business within the State of Arizona.¹⁵⁰

The main thrust of the plaintiffs' express preemption argument is that the Act includes some things that are not usually considered licenses within its definition of "license."¹⁵¹ The problem with that argument is that the saving clause includes not just licensing laws but "similar laws" as well.¹⁵² The circuit court did not reach this issue, finding instead that Arizona's "broad definition of 'license' is in line with the terms

(emphasis added). Congress expressly preserved the states' right to decide who could and could not be licensed to conduct business within the state. 8 U.S.C. § 1324a(h)(2).

148. Answer Brief for Defendant/Appellee, *supra* note 47, at 19-27.

149. See ARIZ. REV. STAT. ANN. §§ 23-211 to -216 (2008). Indeed, the main sanctions for violating the Act are the suspension and revocation of licenses. §§ 23-212(F), 23-212.01(F) (2008). As far as employer sanctions are concerned, the Act is, by its own terms, a licensing law. See §§ 23-211 to -216 (2008).

150. See *supra* note 147. See also §§ 23-212(F), 23-212.01(F) (2008). Despite the comprehensive nature of IRCA, Congress was careful to specifically preserve this authority for the States. H.R. REP. NO. 99-682(I), at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662. The plaintiffs' argument seems to assert that states are not allowed to determine who can and cannot do business within the state in the immigration context. See *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2008). Only the federal government, they argue, has that authority. *Chicanos Por La Causa*, 558 F.3d at 864-65. The existence of federalism under the United States Constitution precludes such a result. *DeCanas*, 424 U.S. at 355 ("[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."). See also *Plyler v. Doe* 457 U.S. 202, 225-26 (1982) (expressly reaffirming *DeCanas*). Here, as in *DeCanas*, the state law in question "mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). Established Supreme Court precedent guarantees the states limited immigration authority under these circumstances. *Plyler*, 457 U.S. at 225-26. See also *DeCanas*, 424 U.S. 351. Rather than asking the court to overrule precedent, however, the plaintiffs try to craft arguments to get around the issue of federalism, such as when they argue that Arizona did not properly define the word "license." *Chicanos Por La Causa*, 558 F.3d at 865. See also *infra* note 151-53 and accompanying text. Evidently, the plaintiffs were under the misapprehension that courts do not give legislatures some deference. See, e.g., *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959) (tax law context); *Solem v. Helm*, 463 U.S. 277, 290 (1983) (criminal law context); *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 865 n.13 (2005) (economic law context). Such deference does exist, though, and the plaintiffs failed to even approach satisfying their burden that Arizona's definition was unreasonable and thus not entitled to such deference. *Chicanos Por La Causa*, 558 F.3d at 861. Arizona's legislature can, so long as reasonable, define "license" however it wishes. See, e.g., *Jones v. U.S.*, 463 U.S. 354, 365 n.13 (1983) ("[C]ourts should pay particular deference to reasonable legislative judgments.")

151. Consolidated Opening Brief for Plaintiff/Appellant, *supra* note 28, at 28-30.

152. 8 U.S.C. § 1324a(h)(2); *Chicanos Por La Causa*, 558 F.3d at 863.

traditionally used.”¹⁵³ The implied preemption issues were also correctly decided by the circuit court.¹⁵⁴ The Act was not impliedly preempted by federal law because any conflict is “hypothetical” at this point.¹⁵⁵ However, the Act is more than just not in conflict with federal law, it is in fact complementary to federal immigration law.¹⁵⁶ If the Act is applied the way Arizona proposes, it should never be conflict-preempted.¹⁵⁷ Although the court does not address the issue, the Act should also easily avoid field preemption so long as Congress fails to respond to Arizona’s legitimate concerns about IRCA’s efficacy.¹⁵⁸

2. The Failure of the Federal Government

Congress passed IRCA with unquestionably good intentions.¹⁵⁹ Congress believed IRCA’s employer sanctions were “the most humane, credible[,] and effective way to respond” to the problem of illegal immigration.¹⁶⁰ Unfortunately, IRCA has been a failure in this respect.¹⁶¹ In more than twenty years after its passage, IRCA has done

153. *Chicanos Por La Causa*, 558 F.3d at 865. There are pros and cons to the court’s characterization of this particular point. On the one hand, actual “licensing” laws will likely be far easier to uphold than “similar laws,” if only because there will always be arguments about what constitutes a “similar law.” On the other hand, the court passed up an opportunity to define and clarify “similar laws.” Right or wrong, the court’s choice will likely lead to more litigation if additional states attempt to implement laws like the Legal Arizona Workers Act in the Ninth Circuit. *See generally Chicanos Por La Causa*, 558 F.3d at 865.

154. There are two types of implied preemption arguments the plaintiffs made: field and conflict preemption. Consolidated Opening Brief for Plaintiff/Appellant, *supra* note 28, at 34-53. The field preemption argument does not seem to have been addressed by the circuit court. *See Chicanos Por La Causa*, 558 F.3d 856. There were two aspects to the Plaintiffs’ conflict preemption argument. *Chicanos Por La Causa*, 558 F.3d at 863. First, the plaintiffs argued that the entire Act was conflict preempted. *Id.* Second, they argued that even if the Act was not completely preempted, the mandatory E-Verify requirement was preempted. *Id.* *See also* Consolidated Opening Brief for Plaintiff/Appellant, *supra* note 28, at 35-44.

155. *Chicanos Por La Causa*, 558 F.3d at 866. In order for conflict preemption to work, there must be an actual conflict rather than simply a possible one. *Id.*

156. *See id.*

157. *See id.* Undoubtedly, there are ways to enforce a completely non-conflicting law in conflicting ways; however, such enforcement would most likely fail for due process reasons, not conflict preemption reasons. *See id.* at 867-69.

158. *See* Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 1. *See also* Consolidated Opening Brief for Plaintiff/Appellant at 44-53, *supra* note 100.

159. *See* H.R. REP. No. 99-682(I), at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650. Congress’s hope was to “close the back door on illegal immigration.” *Id.*

160. *Id.* Congress thought that without sanctions, the influx of undocumented aliens would continue to rise. *Id.* at 47.

161. Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 1. *See also supra* note 127; *Ariz. Contractors Ass’n v. Napolitano (Ariz. Contractors I)*, 526 F. Supp. 2d 968 (D. Ariz. 2007). Additionally, the legislative history of IRCA shows that similar sanctioning measures in other

little to limit the influx of unauthorized aliens.¹⁶² In fact, in March 2005, there were approximately seven million unauthorized aliens working in the United States.¹⁶³ By contrast, at the time of IRCA's enactment in 1986, Congress estimated the number of unauthorized aliens to be around three million.¹⁶⁴ Despite Congress's best efforts, people are still entering the United States illegally and many enter the workforce.¹⁶⁵ In her signing statement, then-Governor Napolitano said "it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs."¹⁶⁶ Under such circumstances, it would be antithetical to the very purposes of IRCA for a helpful law like the Act to be preempted.¹⁶⁷

3. Cooperative Federalism

One of the major principles underlying the United States' Constitution is the necessity of cooperation among federal and state governments.¹⁶⁸ An important goal of our federal system is the formation of a "workable government," which can best be accomplished through such cooperation.¹⁶⁹ Indeed, even today there are continuing

countries have proven effective, making the federal government's failure even more resounding. H.R. REP. NO. 99-682(I), at 47.

162. See *infra* note 164. See also Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 1.

163. *Ariz. Contractors I*, 526 F. Supp. 2d at 973. According to the district court's findings, unauthorized aliens make up about 5 percent of the United States' workforce. *Id.*

164. Ruth Ellen Wasem, *Unauthorized Aliens in the United States: Estimates Since 1986*, Congressional Research Service (2004) at 1, available at http://www.immigrationforum.org/documents/crs/CRS_undocumented_2004.pdf. The estimates in this report, which ended in 2002, show two million more unauthorized aliens in 2002 than the district court found in 2005. *Id.* See also *supra* note 161 and accompanying text.

165. See *supra* notes 163-64.

166. Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 1.

167. See H.R. REP. NO. 99-682(I), at 45-49 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5649-53 (for the underlying purposes of IRCA). See also *supra* note 52 and accompanying text.

168. See, e.g., U.S. CONST. art. IV. Article IV of the Constitution is swarming with required cooperation, giving the impression that the Framers knew a cooperative government would be the most effective. *Id.* For example, each state must give full faith and credit "to the public Acts, Records, and judicial Proceedings" of other states. U.S. CONST. art. IV, § 1. The federal government then, through Congress, has the power to regulate that cooperation. *Id.* Article IV also forces states to cooperate on the extradition of fugitives and the return of runaway slaves. U.S. CONST. art. IV, § 2, cl. 2-3.

169. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."). While Justice Jackson spoke of the separation of powers rather than federalism, the principle applies just as strongly because it is merely a further diffusion of power. See *id.* State governments and the federal government also enjoy the "separateness but interdependence, autonomy but reciprocity"

calls for cooperation among the state and federal governments.¹⁷⁰ When the federal government has shown it cannot solve a problem, states must be allowed the opportunity to step in and assist.¹⁷¹ Arizona has done nothing more than advance the goals of Congress—goals the federal government is unable to achieve.¹⁷² The Ninth Circuit correctly recognized that the Act augments IRCA rather than conflicting with it.¹⁷³ When cases like this arise, states should be able to freely exercise their role as laboratories in order to experiment with varying solutions to the complex problems presented.¹⁷⁴ The idea that state governments can supplement and improve federal governance is the crux of the federal system.¹⁷⁵ Acknowledging this fact makes it impossible to conclude that the Act is field or conflict preempted without denying the existence of federalism altogether.¹⁷⁶ If states were not allowed to regulate in this manner, federalism would be rendered a dead letter because all the meaningful power (including, under Plaintiff’s argument, the power to

that the three branches of the federal government share. *Id.* at 635. See also *U.S. v. Nixon*, 418 U.S. 683, 707 (1974).

170. Stephen Kaufman, *Obama, U.S. Governors Seek Cooperation on Troubled Economy*, America.gov, Dec. 4, 2008, <http://www.america.gov/st/usg-english/2008/December/20081204171807esnamfuak0.5725214.html?CP.rss=true>

171. See Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 1.

172. See *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 866-67 (9th Cir. 2008).

173. *Id.* The plaintiffs seem to have thrown out every possible argument in an attempt to get the law overturned prior to enforcement. See Consolidated Opening Brief for Plaintiff/Appellant, *supra* note 28. Sometimes, as here, this takes on an air of “grasping at straws” rather than solidly-based legal arguments. See, e.g., *Chicanos Por La Causa*, 558 F.3d at 866.

174. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 386-87 (1932) (Brandeis, J., concurring).

It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

Id. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (“States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear”). The idea of states as laboratories uses the democratic process to find new and innovative ways to solve difficult problems. See *Blakely v. Washington*, 542 U.S. 296, 327 (2004) (Kennedy, J., dissenting) (citing “the interest of the States to serve as laboratories for innovation and experiment”); *Arizona v. Evans*, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting) (States useful as laboratories for “testing solutions to novel legal problems”).

175. See *supra* note 168 and accompanying text. Cooperation was one of the keys to the “more perfect union” the framers hoped to create. See U.S. CONST. pmb1. See also *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting).

176. See *supra* note 78.

prevent a state from deciding how to license businesses within its borders) would be in the hands of the federal government.¹⁷⁷ Although the Constitution contemplates the expansion of the federal government's powers, it does not allow for the states to be prevented from helping the federal government effectively meet its goals.¹⁷⁸ This is the principle of cooperative federalism upon which the Ninth Circuit believed the Act to be based.¹⁷⁹ In fact when Congress has failed, "states like Arizona have no choice" other than to address the problem themselves or risk it becoming much more severe.¹⁸⁰ There are, of course, many areas where preemption does and should rightfully apply because the federal government is supreme as to the state governments.¹⁸¹ However, preemption should not apply unless Congress has declared a "clear and manifest" purpose to control an entire area of law or when certain authority has been constitutionally granted exclusively to Congress.¹⁸² Neither has happened in this case.¹⁸³ The ability for states to supplement federal law is especially important in an area like illegal immigration because certain states, Arizona among them, are affected more than

177. See generally THE FEDERALIST, No. 47 (James Madison). Indeed, this was the problem James Madison feared. *Id.* ("The accumulation of all power . . . in the same hands, whether of one, or few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.")

178. See *New York v. United States*, 505 U.S. 144, 157 (1992) (" . . . the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role."). See also U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); John H. Clough, *Federalism: The Imprecise Calculus of Dual Sovereignty*, 35 J. MARSHALL L. REV. 1, 2 (2001).

179. *Chicanos Por La Causa v. Napolitano*, 544 F.3d 976, 985 (9th Cir. 2008) ("[The Act] is premised on the enforcement of *federal* standards as embodied in *federal* immigration law.") (emphasis added).

180. Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 3.

181. *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819) ("The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'")

182. *Ariz. Contractors Ass'n v. Candelaria (Ariz. Contractors II)*, 534 F. Supp. 2d 1036, 1040-41 (D. Ariz. 2008), *aff'd sub nom. Chicano Por La Causa v. Napolitano*, 558 F. 3d 856 (9th Cir. 2008); see also U.S. CONST. art. I, § 8. Of course, it has long been recognized that immigration law itself is the near-exclusive province of Congress. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982). However, the Supreme Court has maintained that there are rare instances when "such matters [are] relevant to legislation by a State. *Plyler*, 457 U.S. at 225. According to the Supreme Court, "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Id.* The Act easily meets both of these requirements. See *Chicanos Por La Causa*, 558 F.3d 856.

183. See *Chicanos Por La Causa*, 544 F.3d 976.

others.¹⁸⁴ Conflict or field preemption in situations like this, where the State is exploring strategies to help an inefficient Congress would be counterproductive to the concept of federalism and would render the government unworkable.¹⁸⁵

C. *Benefits of the Arizona Act*

In addition to the strictly legal reasons for the circuit court's decision in *Chicanos Por La Causa*, there are also many benefits which should inure as a result of its passage.¹⁸⁶ The main benefit of the Act is that it addresses illegal immigration by attacking the lure rather than the immigrants.¹⁸⁷ Going after employers is the best way to control the flow of unauthorized aliens because with fewer jobs, the likelihood is that fewer immigrants would have a reason to enter the country illegally.¹⁸⁸ It is important to note that the state of Arizona is not by itself in believing employers should bear the responsibility—Congress surely

184. Steven A. Camarota, IMMIGRANTS IN THE UNITED STATES, 2007: A PROFILE OF AMERICA'S FOREIGN-BORN POPULATION, Table 21. Center for Immigration Studies Backgrounder (November 2007) available at <http://www.cis.org/articles/2007/back1007.pdf>. The Center for Immigration Studies estimates that illegal immigrants constitute 9 percent of Arizona's population (including 12 percent of its workforce), the highest percentage of any state. *Id.* at 31. The national average in the United States is for illegal aliens to comprise about four percent of a state's population. *Id.* Given the fact that Arizona (as well as California, and almost Texas) has more than double the national average, Arizona's knowledge of conditions on the ground must be given some level of deference. *See id.* Arizona deals with more than twice as high a percentage of illegal immigrants as the average state and, as such, should be the bellwether for determining whether federal action is effective enough to solve problems without state and local assistance. *See id.*; Letter from Janet Napolitano to Jim Weiers, *supra* note 1.

185. *See supra* note 175 and accompanying text. The Legal Arizona Workers Act contains many provisions which aim to improve federal, state, and local cooperation, thereby strengthening the federal system without any government stepping too firmly on the toes of another. *See e.g.*, ARIZ. REV. STAT. ANN. §§ 23-212(C) (requiring the attorney general to report any employed unauthorized aliens to both U.S. immigration and customs and local law enforcement agencies), 23-212(H) (requiring the Arizona state courts to base decisions as to the legal status of aliens only on the federal government's findings under 8 U.S.C. § 1373(c)), 23-212(J) (allowing for an affirmative defense if an employer can show good faith compliance with federal law).

186. For example, compliance with the Act's verification requirements "establishes an affirmative defense that an employer did not intentionally or knowingly employ an unauthorized alien." §§ 23-212(J), 23-212.01(J). This is merely an immediate, practical benefit for employers. Further benefits will be discussed *infra*.

187. *See, e.g.*, Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 1 (citing the demand for cheap labor as a major force in bringing unauthorized aliens to Arizona).

188. *See id.* *See also* H.R. REP. No. 99-682(I), at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650 ("Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status").

agrees.¹⁸⁹ While sanctioning employers will probably not eliminate illegal immigration by itself, it will force employers to refrain from blatantly disregarding the law and to employ more careful hiring practices.¹⁹⁰ The good news for employers in all this is that compliance with the Act is fairly simple.¹⁹¹ Once the Act is complied with, employers are no longer at risk of unexpected liability.¹⁹² One study found that approximately 10 percent of workers submitted for verification were unauthorized to work in the United States.¹⁹³ Additionally, very few of those 10 percent challenge E-Verify's initial finding of unauthorized status.¹⁹⁴ Imagine the benefit for employers in weeding out this 10 percent before incurring liability.¹⁹⁵ A further important, albeit somewhat tangential, benefit will help United States citizen workers because they will no longer be forced to compete with the usually lower-paid unauthorized aliens for jobs.¹⁹⁶

The decision by the Court of Appeals will also open up new avenues for future immigration reform, such as those Arizona was hoping the Act would lead Congress to implement.¹⁹⁷ The election of President Barack Obama has put a familiar face, that of Janet Napolitano, in the forefront of this push for immigration reform as Secretary of Homeland Security.¹⁹⁸ A powerful critic of the ineffectiveness of IRCA and the unwillingness of Congress to reform, Napolitano brings clear priorities to her new office.¹⁹⁹ During her

189. *See id.* The passage of IRCA, and in particular its employer sanctioning provisions, shows Congress believed that employers were at least partially responsible for what it perceived as the "problem" of illegal immigration. *See id.*; 8 U.S.C. § 1324a.

190. *See* H.R. REP. No. 99-682(I), at 46.; ARIZ. REV. STAT. ANN. §§ 23-212(J), 23-214, 23-215.

191. *See* §§ 23-212(I), 232-212(J), 23-212.01(I), 23-212.01(J).

192. *Id.* Verification of an employee's status through the E-Verify system provides the employer with the shield of a rebuttable presumption that she did not violate the Act. *See* §§ 23-212(I), 232-212(J), 23-212.01(I).

193. *Ariz. Contractors Ass'n v. Napolitano (Ariz. Contractors I)*, 526 F. Supp. 2d 968, 974-75 (D. Ariz. 2007).

194. *Id.* at 975. What this amounts to is that only one-tenth of 1 percent of verification requests results in a final, formal "unauthorized" finding. *Id.*

195. *See supra* note 192.

196. *See, e.g.*, H.R. REP. No. 99-682(I), at 46-49 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5651-53.

197. *See* Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 3.

198. Daniel González and Sean Holstege, *Napolitano Pick Signals Moderate Immigration Approach*, THE ARIZONA REPUBLIC, Nov. 21, 2008, *available at* <http://www.azcentral.com/news/articles/2008/11/21/20081121borderpolicy1121.html>.

199. *See id.*; John Yaukey, *Napolitano Outlines Immigration Policy*, THE ARIZONA REPUBLIC, Jan. 16, 2009, *available at* <http://www.azcentral.com/arizonarepublic/news/articles/2009/01/16/20090116napolitano0116.html>.

confirmation hearings, she did not go into extensive detail but expressed support for border fences in problem areas and using technology to track movement around the border.²⁰⁰ She also reiterated her support for punishing employers for hiring unauthorized workers.²⁰¹ If Napolitano's efforts do lead to the comprehensive immigration reform she wants, it will be interesting to see the results.²⁰²

D. *The Impact of Chicanos Por La Causa*

1. Impact on Immigration Law

One of the most important aspects of the court's decision in *Chicanos Por La Causa* will not be immediately seen, because it concerns the case's impact on the future of immigration law in the United States.²⁰³ Arizona's hope is that Congress will eventually step in and fix the problems with current immigration law.²⁰⁴ The most obvious problem with the current law is its ineffectiveness.²⁰⁵ By allowing Arizona to enact its own employer sanctions—even through on its face, it is nothing more than a licensing law—the court has decided that Arizona can do something in the face of that ineffectiveness.²⁰⁶ Arizona fully expects other states to follow its lead and pass employer sanctioning laws similar to the Act.²⁰⁷ While that prediction has not come to pass en masse on the state level, many local governments have enacted similar laws.²⁰⁸ These laws have found mixed success against

200. Yaukey, *supra* note 199. Among her other top priorities were “improving disaster response, enhancing transportation security and tracking emerging terrorist threats,” which are beyond the scope of this paper. *Id.* The author wishes it to be clear he does not support the building of border fences.

201. *Id.* (“You have to deal with illegal immigration from the demand side as well as the supply side. . . . You have deal with what is drawing people across the border, and that is a job”).

202. See Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 3.

203. The potential impact Arizona could have on immigration law, particularly reform of the current law, was one of the motivations behind the Act's passage. *Id.*

204. See *id.* at 1 (declaring immigration a “federal responsibility”).

205. *Ariz. Contractors Ass'n v. Napolitano (Ariz. Contractors I)*, 526 F. Supp. 2d 968, 972-73 (D. Ariz. 2007). See also *supra* note 127.

206. See *Chicanos Por La Causa v. Napolitano*, 544 F.3d 976, 984 (9th Cir. 2008) (“ . . . the power to regulate the employment of unauthorized aliens remains within the states' historic police powers . . .”). See also Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 3 (“Because of Congress' failure to act, states like Arizona have no choice but to take strong action to discourage the further flow of illegal immigration through our borders.”).

207. See *id.* (“Now that Arizona has acted, other states are likely to follow.”).

208. See, e.g., *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, slip op. (E.D. Mo. Jan. 31, 2008) (upholding a city ordinance that sanctioned employers for hiring unauthorized aliens);

preemption challenges.²⁰⁹ However, in *Gray v. City of Valley Park*, the local law most similar to the Act was upheld by the district court against a facial challenge much like the one presented in *Chicanos Por La Causa*.²¹⁰ The *Chicanos Por La Causa* decision is more important, however, because unlike the city ordinance in *Gray*, the Legal Arizona Workers Act was enacted by a state, which has quasi-sovereign powers in the federal system.²¹¹ By using its own regulatory powers, Arizona hopes to force Congress to reevaluate its current strategy for combating illegal immigration.²¹²

2. Criticisms and Rebuttal

Since its passage, the Act has been a lightning rod for criticism.²¹³ One of the major criticisms is that the E-Verify system is unreliable and that Congress kept the program voluntary at least partially for that reason.²¹⁴ The voluntary nature of E-Verify is likely a contributing factor to any unreliability of the data; the more users feeding information into the system, the more accurate the information will be because one user can catch another user's mistakes.²¹⁵ Part of the concern over the

Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858 (N.D. Tex., 2008) (overturning a city ordinance similar to the Act, except that the ordinance sanctioned landlords rather than employers); Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Penn. 2007) (invalidating a similar city ordinance as preempted by IRCA). For further discussion of *Gray v. City of Valley Park*, and why the *Chicanos Por La Causa* decision is more important, see *infra* notes 210–12 and accompanying text.

209. See *supra* note 208.

210. *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, slip op. at *1. In *Gray*, the City of Valley Park, Missouri enacted two separate ordinances concerning illegal immigration. *Id.* One ordinance punished landlords for leasing to illegal immigrants; the other sanctioned employers for hiring them. *Id.* The landlord ordinance was later repealed, leaving only the employer sanctions provision to be challenged before the district court. *Id.* After arguments nearly identical to those put forth by the plaintiffs in *Chicanos Por La Causa*, the district court upheld the employer sanctioning ordinance. *Id.* at *31. Both preemption and due process issues were presented and resolved in much the same manner as in *Chicanos Por La Causa*. *Id.*

211. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007). In *Massachusetts*, the Supreme Court found standing for Massachusetts to challenge the Environmental Protection Agency's non-regulation of greenhouse gas emissions. *Id.* The court's grant of standing was based in part on "Massachusetts' stake in protecting its quasi-sovereign interests," which provided the State with "special solicitude" in the Court's analysis. *Id.* at 518-20.

212. Letter from Janet Napolitano to Jim Weiers, *supra* note 1, at 3.

213. See, e.g., *Wake Up Arizona!*, *supra* note 124.

214. See Consolidated Opening Brief for Plaintiff/Appellant, *supra* note 28, at 38-42.

215. See *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 867 (9th Cir. 2008) (discussing Congress's encouragement of E-Verify use). See also *Ariz. Contractors Ass'n v. Candelaria (Ariz. Contractors II)*, 534 F. Supp. 2d 1036, 1055-57 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa v. Napolitano*, 558 F. 3d 856 (9th Cir. 2008) (discussing Congress's desire for a more accurate verification system).

data's reliability stems from the fact that E-Verify determines "whether a Social Security number presented by an employee is indeed a valid number," but does not determine whether that number belongs to the employee presenting it.²¹⁶ This might be a valid argument if there was better system available; however, there is not one.²¹⁷ Mandatory use of E-Verify will make the system more reliable, not less reliable; that was Congress's policy behind implementing the basic pilot programs in the first place.²¹⁸ In addition, there are already programs available that will make E-Verify even more reliable in the long run.²¹⁹

Another criticism of the Act is that it will lead to increased discrimination, particularly on the basis of ethnicity and race.²²⁰ The fear is that employers will ensure they are not hiring unauthorized workers by refusing to hire any minorities at all.²²¹ The circuit court rejected this argument for lack of evidence.²²² Opponents of the Act are also concerned that the provisions allowing citizen-assistance in enforcement will lead to discrimination.²²³ This threat is overstated, because the Act provides for criminal liability for anyone who files a

216. Wake Up Arizona!, *supra* note 124.

217. U.S. Department of Homeland Security: E-Verify, http://www.dhs.gov/xprevprot/programs/gc_1185221678150.shtm (last visited October 30, 2008). *See also supra* note 42. Not only does E-Verify get the full, unquestioned endorsement of the Department of Homeland Security, it is also now required for any company contracting with the federal government. Exec. Order No. 13465, 73 Fed. Reg. 33285 (June 6, 2008). *See also* *Ariz. Contractors Ass'n v. Napolitano (Ariz. Contractors I)*, 526 F. Supp. 2d 968, 974 (D. Ariz. 2007) ("According to the U.S. Citizenship and Immigration Services, 'E-Verify is currently the best means available for employers to verify electronically the employment eligibility of their newly hired employees. E-Verify virtually eliminates Social Security mismatch letters, improves the accuracy of wage and tax reporting, protects jobs for authorized U.S. workers, and helps U.S. employers maintain a legal workforce.'").

218. *Ariz. Contractors II*, 534 F. Supp. 2d at 1055-57. *See also supra* note 215 and accompanying text.

219. *See Ariz. Contractors I*, 526 F. Supp. 2d at 975. Although E-Verify is still somewhat susceptible to fraud (just like the I-9 system), a piloting photographic screening tool, which would allow employers to identify fraud more easily and accurately is available to all users of E-Verify. *Id.* This tool should also help limit the potential for discrimination, discussed *infra* notes 220-28.

220. *See e.g.*, Wake Up Arizona!, *supra* note 124; H.R. REP. No. 99-682(I), at 68-71 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5672-5676.

221. *See* H.R. REP. No. 99-682(I), at 68-71. "There is a potential chilling effect on hiring minority job applicants. The unfortunate guarantee that a business isn't hiring an illegal worker could be simply not to hire applicants that would even be suspected of being from another country." Wake Up Arizona!, *supra* note 213.

222. *Chicanos Por La Causa v. Napolitano*, 558 F. 3d 856, 867 (9th Cir. 2008). *See also supra* notes 115-16 and accompanying text.

223. *See* ARIZ. REV. STAT. ANN. §§ 23-212(B), 23-212.01(B) (allowing anyone to complain of a violation of the Act). *See also Chicanos Por La Causa*, 558 F. 3d at 862.

frivolous complaint.²²⁴ These concerns about potential discrimination are nothing new, however, as Congress worried greatly about discrimination when passing IRCA.²²⁵ The Immigration and Nationality Act contains sufficient protections against immigration-related employment discrimination.²²⁶ IRCA required the President to create a new office in the Justice Department to handle immigration-related employment practices to make sure discrimination would not become an issue.²²⁷ Both the Clinton and George W. Bush administrations supported these anti-discrimination goals.²²⁸ Furthermore, the ease of compliance with the Act makes discrimination even less likely because employers can quickly verify the statuses of potential employees,

224. §§ 23-212(B), 23-212.01(B) (“A person who knowingly files a false and frivolous complaint under this subsection is guilty of a class 3 misdemeanor.”)

225. H.R. REP. No. 99-682(I), at 68-71.

226. 8 U.S.C. § 1324b (1996). This section prohibits employment “discrimination based on national origin or citizenship status.” *Id.* The discrimination prohibition reads in pertinent part:

It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment--

(A) because of such individual’s national origin, or

(B) in the case of a protected individual . . . , because of such individual’s citizenship status.

8 U.S.C. § 1324b(a)(1). “Protected individual” is defined as either a citizen or national of the United States or “an alien who is lawfully admitted” to or granted asylum in the United States. 8 U.S.C. § 1324b(a)(3). The section contains three exceptions: (1) employers with three employees or fewer, (2) discrimination covered by the Civil Rights Act of 1964, and (3) “discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.” 8 U.S.C. § 1324b(a)(2). Despite these troubling exceptions, the Immigration and Nationality Act still provides the vast majority of potential employees with protection from discrimination so long as they are authorized to work in the United States. *See* 8 U.S.C. § 1324b.

227. H.R. REP. No. 99-682(I), at 71.

228. *See also* Exec. Order No. 12989, 61 Fed. Reg. 6091, 6091 (Feb. 13, 1996)

It remains the policy of this Administration to fully and aggressively enforce the antidiscrimination provisions of the Immigration and Nationality Act to the fullest extent. Nothing in this order relieves employers from their obligation to avoid unfair immigration-related employment practices as required by the antidiscrimination provisions of section 1324(b) of the INA (8 U.S.C. 1324b) and all other antidiscrimination requirements of applicable law, including the requirements of 8 U.S.C. 1324b(a)(6) concerning the treatment of certain documentary practices as unfair immigration-related employment practices.

Id. This executive order was later amended by Executive Order No. 13,286 in 2003, but none of the changes affected the above language. *See* Exec. Order No. 13286, 68 Fed. Reg. 10619,10623-24 (Feb. 28, 2003).

allowing them to remain equal-opportunity employers without using significantly more resources than before.²²⁹

A final major criticism, and partly the basis for the Plaintiffs' conflict pre-emption claims, is that the Act will lead to a loss of uniformity in immigration law.²³⁰ In enacting the Legal Arizona Workers Act, the State of Arizona has turned the tables on the federal government in this respect, placing the onus to act on Congress if it wishes uniformity.²³¹ It even appears from Napolitano's signing statement that goading the federal government into creating an effective, uniform national standard was one of the goals behind the Act's passage.²³² Put simply, none of these criticisms create a level of concern high enough to successfully sustain a facial challenge.²³³

V. CONCLUSION

The United States Court of Appeals for the Ninth Circuit made the correct decision in *Chicanos Por La Causa*, upholding a statute sanctioning employers for knowingly or intentionally hiring unauthorized aliens.²³⁴ The court's conclusion furthers Congress's purpose by allowing another line of defense against the problem of unauthorized immigrants.²³⁵ The only reservation the circuit court

229. See *supra* notes 49, 191-92 and accompanying text.

230. Consolidated Opening Brief for Plaintiff/Appellant, *supra* note 28, at 3, 5. According to the plaintiffs, the Act "establishes a state-wide scheme for sanctioning employers that allegedly employ aliens who are unauthorized to work That scheme differs markedly from the uniform employer sanctions system Congress enacted as part of the Immigration Reform and Control Act of 1986." *Id.* at 3.

231. See generally Letter from Janet Napolitano to Jim Weiers, *supra* note 1.

232. *Id.* at 3 ("For our country to have a uniform and uniformly enforced immigration law, the United States Congress must act swiftly and definitively to solve this problem at the national level.").

233. See *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 869 (9th Cir. 2008). See also *supra* note 123.

234. *Chicanos Por La Causa*, 558 F.3d at 869. See also *supra* notes 107-23 and accompanying text; ARIZ. REV. STAT. ANN. §§ 23-212(F), 23-212.01(F) (2008). On July 24, 2009, the plaintiffs filed a petition for a writ of certiorari with the United States Supreme Court. Petition for a Writ of Certiorari, Chamber of Commerce of the United States of America v. Candelaria, No. 09-115 (U.S. July 24, 2009), 2009 WL 2331990. The Supreme Court has yet to decide whether to grant the petition; however, the Court has asked the Solicitor General to submit a brief detailing the Federal Government's position on the issue. Daniel González and Dan Nowicki, *Justices May Hear Disputed Arizona Law*, THE ARIZONA REPUBLIC, Nov. 3, 2009, available at <http://www.azcentral.com/arizonarepublic/news/articles/2009/11/03/20091103sanctionslaw1103.html>.

235. See e.g., H.R. REP. No. 99-682(I), at 45-49 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5649-53.

expressed was in limiting its opinion to cover only facial challenges.²³⁶ However, there is little reason to expect that application and enforcement challenges would not also fail.²³⁷ The potential for the Act to conflict with federal law in application is limited by the Act itself, which forces the superior court to use only the federal government's determination of an employee's status as a basis for liability under the Act.²³⁸ It is also likely that enforcement and compliance will both be easier to achieve on the state level than the federal or local levels.²³⁹

The court's decision also increases the likelihood of action from Congress in regard to national immigration policy, which many believe to be outdated.²⁴⁰ The E-Verify system does have some reliability problems; however, without the court's decision, Congress would have little impetus to fix those problems and improve the system.²⁴¹ Most important, however, are the enhanced prospects for cooperation.²⁴² This includes cooperation among the various levels of government in the United States and international cooperation between this country and those from which illegal immigrants come to the United States.²⁴³

236. *Chicanos Por La Causa*, 558 F.3d at 861.

237. *Chicanos Por La Causa*, 558 F.3d at 866. See also *supra* note 95 and accompanying text. The plaintiffs raised the issue that an employer may be subject to different rulings from state and federal courts based upon the same hiring event. *Chicanos Por La Causa*, 558 F.3d at 866. The court hints that issue preclusion may prevent such a result but notes that neither party addressed that issue. *Id.*

238. ARIZ. REV. STAT. ANN. § 23-212(H) (“On determining whether an employee is an unauthorized alien, the court shall consider only the federal government’s determination pursuant to 8 United States Code § 1373(c).”).

239. See Huyen Pham, *Local Dimensions of Immigration: Challenges and Opportunities in Our Changing Communities*, 36 HOFSTRA L. REV. 1303, 1310-11 (2008) (discussing implementation problems that local governments have with immigration laws).

240. See *supra* notes 203-12 and accompanying text. See also, Letter from Janet Napolitano to Jim Weiers, *supra* note 1.; Pham, *supra* note 293, at 1310 (discussing the popularity of local immigration laws in light of public frustration with federal immigration policies).

241. See *supra* notes 214-19 and accompanying text. This increased motivation is in addition to the piloting photographic screening tool Congress has already created to improve E-Verify’s accuracy. *Ariz. Contractors Ass’n v. Napolitano (Ariz. Contractors I)*, 526 F. Supp. 2d 968, 975 (D. Ariz. 2007).

242. See *supra* note 185.

243. See *supra* note 185. During the hearings for IRCA, the House Judiciary Committee recognized the importance of international cooperation: “The committee believes that the primary reason for the illegal alien problem is the economic imbalance between the United States and the countries from which aliens come, coupled with the chance of employment in the United States.” H.R. REP. No. 99-682(I), at 52 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5656. International cooperation could lead to a solution that will allow the United States to retain the benefits of unauthorized aliens without a “drain” on the economy and also help the economies of other countries improve so that more of those aliens stay in their home countries rather than risking coming to the United States for a better opportunity.

Congressional action is especially likely and, some would argue, important in the current economic climate.²⁴⁴ While perceptions of illegal immigrants' value vary, a large segment of the American public believes illegal immigration is a problem.²⁴⁵ A large part of the reason that the illegal immigration problem is so complicated and why Congress has been so slow to reform federal immigration policy is because illegal immigrants are simultaneously a threat and asset to the United States' economy.²⁴⁶ In these difficult economic times, other countries likely do not want their best and brightest citizens leaving to come to the United States because those economies would benefit greatly from such people remaining at home.²⁴⁷

The proper place for the burden of verifying the employment eligibility of employees is with the employer.²⁴⁸ With the passage of the Legal Arizona Workers Act, the State of Arizona has allocated this burden without interfering with the goals and purposes of Congress as expressed in IRCA and its legislative history.²⁴⁹ By upholding the statute, the Ninth Circuit Court of Appeals has reinforced the tenets of federalism in allowing a state to experiment with new and innovative

244. *Id.* at 47. (citing the importance of action on illegal immigration during tough economic times).

245. See generally Pham, *supra* note 239, at 1310 (discussing the popularity of local immigration laws). There has long been a debate as to whether illegal immigration is a drain or a benefit to the United States' economy. See, e.g., ACLU ProCon.org, *Are Illegal Immigrants Damaging America's Economy and Security?*, available at <http://aclu.procon.org/viewanswers.asp?questionID=713>. The Federation for American Immigration Reform claims unauthorized aliens are a drain on the economy because "[m]ost illegal aliens have low educational attainment, few skills, and they work for low wages, often in the underground economy where they pay no taxes on their earnings." *Id.* There is also concern that the poorest, least educated American workers should not have to compete for jobs with unauthorized aliens. *Id.* On the other hand, the American Civil Liberties Union argues that illegal immigrants "create new jobs by forming new businesses, spend[] their incomes on American goods and services, pay[] taxes and rais[e] the productivity of U.S. businesses." *Id.* It has also been argued that immigrants add to the economy because they come when they are "young and working" and often contribute to social security without collecting because they are often using fake social security numbers. *Id.* One impact that I hope this case has is that Americans rethink their perceptions of illegal immigrants and their value to American society and the economy.

246. See e.g., ACLU ProCon.org, *supra* note 245. My sister worked in the restaurant industry for many years and is convinced that if the United States government removed all the unauthorized workers, the entire industry would be crippled.

247. See e.g., Robert F. Blomquist, *Pragmatically Managing Global Labor Migration?*, 37 U. MEM. L. REV. 1, 12 (2006) (recognizing "the concern . . . that if the best and brightest of a poor country's brains and brawn emigrate, economic development in countries of origin may be slowed.").

248. See *supra* notes 128-43 and accompanying text.

249. See *supra* notes 144-58 and accompanying text.

ways to solve a very complicated problem.²⁵⁰ This attempt to regulate illegal immigration on the state level is especially important in light of the complete failure of the federal government to find a workable solution.²⁵¹ The Act's many benefits will have a profound effect on employers, employees, and the future of immigration law in the United States.²⁵² This case is an important first step on the long road to comprehensive reform of federal immigration law.²⁵³

250. *See supra* notes 168-85 and accompanying text.

251. *See supra* notes 159-65 and accompanying text.

252. *See supra* notes 186-212 and accompanying text.

253. *See supra* notes 124-233 and accompanying text.

