Nos. 07-17272, 07-17274, 08-15357, 08-15359, 08-15360

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARIZONA CONTRACTORS ASSOCIATION, INC. et al.,

Plaintiffs/Appellants,

vs.

CRISS CANDELARIA, et al.,

Defendants/Appellees.

And consolidated cases.

AMICUS CURIAE BRIEF OF THE UNITED STATES HISPANIC CHAMBER OF COMMERCE IN SUPPORT OF APPELLANTS

Melinda Guzman
Goldsberry, Freeman & Guzman, LLP
777 – 12th Street, Suite 250
Sacramento, California 95814
Telephone: (916) 448-0448
Facsimile: (916) 448-8628
(General Counsel for the United States Hispanic Chamber of Commerce)

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF THE *AMICUS CURIAE*[1]

USHCC is the nation's largest business chamber that focuses on the needs and issues of Hispanic-owned businesses, employees and consumers. USHCC's membership includes companies and professional organizations of every size, in every industry sector, and from every region of the United States and Puerto Rico. Founded in 1979, the USHCC actively promotes the economic growth and development of Hispanic entrepreneurs and represents the interests of more than 2.5 million Hispanic-owned businesses in the United States and Puerto Rico that generate in excess of $388 billion annually to the American economy. It also serves as the umbrella organization for local, regional and statewide Hispanic chambers in the United States, Puerto Rico, Canada, Mexico, and South America.

The USHCC has a direct interest in this case for several reasons. First, Hispanic employers and Hispanic employees play a significant role in the American economy. Hispanics are the largest minority group in the United States with an estimated population of over 41.3 million. Hispanics are the largest minority group in over 26 states, and they are estimated to grow by more than 1.7 million per year. (U.S. Census Bureau Data of 1970, 1990, 2000, 2004; Pew

[1] Under Rule 37.6 of the Rules of this Court, amicus curiae states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the amicus curiae, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

Hispanic Center, March 2004; Tomas Rivera Policy Institute). Among minority groups, Hispanics continue to own the most companies, and by 2010, Hispanics will own 3.2 million companies and generate in excess of $465 million in revenues. (United States Small Business Administration; HispanTelligence).

Arizona ranks among the top 10 markets for Hispanic businesses with over 35,000 businesses or more than 1 out of 10 businesses in the state and over $4.3 billion in annual receipts. (U.S. Census Bureau 2004; DATOS 2006).

Hispanics also account for over 13 percent of the documented U.S. labor force and are expected to increase to 20 percent by 2030. (HispanTelligence). In Arizona, it is no different. Hispanic Arizonans account for more than 1 out of 5 workers. (DATOS 2006)

If the trial court's decision below is affirmed, Hispanic employers and employees will be subjected to inconsistent immigration laws among states. Out of state companies that do business in Arizona will be forced to abide by state immigration laws which violate federal law and which impose inconsistent burdens which conflict with federal law. They will also be subjected to abiding by different laws in different states, since other states have also drafted legislation on immigration work issues as Arizona has done through the Legal Arizona Workers Act ("Act"). Likewise, Arizona companies that do business on a national or multi-state basis will be subjected to inconsistent rules and regulations which violate

federal law, all of which will make it more difficult to do business in Arizona and elsewhere. Lastly, Hispanic employees may be found by state court judges to be unauthorized to work, in conflict with federal decisions that the same employees are authorized to work, in violation of longstanding federal intent that only the federal government regulate such matters.

SUMMARY OF ARGUMENT

For over a century, the United States Supreme Court has made clear that the federal government has broad and exclusive power to regulate immigration to have a uniform national policy towards immigration. The regulation of immigration implicates exclusively federal concerns, including foreign policy, the maintenance of uniform rules of commerce, for acquiring U.S. citizenship, respect for treaties and concern for reciprocity in the treatment of U.S. citizens abroad. With regard to employment, federal immigration laws present a comprehensive, uniform system, which establish a uniform employee verification system, uniform procedures to determine violations, and which prescribe uniform penalties for violations. The operative word here is "uniform". States cannot adopt their own immigration rules and create their own regulations and sanctions "out of frustration" that the federal government is not doing its job, or for other reasons. Federal preemption and the U.S. Constitution prohibit states from doing so, and Arizona is no exception.

The central question on appeal is whether Arizona may enact a law governing employment of aliens that is distinct from and in conflict with federal immigration laws which govern employment. Although the Governor of Arizona admits that "Immigration is a federal responsibility", she attempts to justify passage of the Legal Arizona Workers Act ("the Act"), A.R.S. §§ 23-211 to 23-214 (Supp. 2007), enacted July 2, 2007 and effective January 1, 2008, by stating that "Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs". Id. However, neither states nor localities may prescribe solutions to this national concern, especially where their legislation conflicts with federal laws and creates inconsistencies which threaten employees, employers and the economy. This court must protect employers and employees against Arizona's impermissible regulation of immigration.

Arizona's law is in conflict with federal law. The Act is not comprehensive and more importantly is inconsistent with federal law by imposing different standards, different procedures, and different penalties on employers. It also allows the State to determine work authorization status (i.e., state courts make the final decision) and mandates the use of an electronic verification system which Congress made voluntary under federal law. The Act is clearly preempted by federal law.

Indeed, Arizona has attempted to override Congress on matters of federal priority, jurisdiction and precedence. Arizona's Act encourages other states to create similar conflicting laws in disregard to Congress and to federal law. Arizona employers' federal rights are violated by the enforcement of a state law which is preempted by federal law and which violates due process. Arizona employees' rights are violated by a system which authorizes the state to determine work authorization status separately from the federal system. Lastly, national and multi-state employers both within and outside of Arizona – and employees who work in multiple states -- are subjected to inconsistent laws and systems in different states all in violation of federal law.

This Court should reverse the district court's ruling to protect employers and their employees from inconsistent standards, procedures and penalties which violate the carefully crafted laws enacted by Congress which govern and preempt Arizona's Act.

ISSUES PRESENTED

1. Whether federal law preempts the Legal Arizona Workers Act, which conflicts with federal immigration laws governing employment, because the Act (1) allows the state to determine work authorization status, (2) provides an aggressive state scheme to sanction employers who have employed unauthorized aliens, and (3) compels participation in a federal Internet

program to verify employee's work authorization status despite federal law which provides that employer participation is voluntary.

2. Whether the Legal Arizona Workers Act violates due process through sanctions of employers for hiring unauthorized workers.
3. Whether the district court erred in dismissing claims against state officials for lack of standing.

ARGUMENT

I. FEDERAL LAW PREEMPTS THE ACT

For over a century, the United States Supreme Court has consistently ruled that the federal government has broad and exclusive power to regulate immigration. This power is supported by both enumerated and implied constitutional powers. The Commerce Clause, Art. I, §8, cl. 3 of the United States Constitution; the Nationalization Clause, Art. I, §8, cl. 4; The Migration and Importation Clause, Art. I, §9, cl. 1; and the War Power, Art. I, §8, cl. 11. The United States Supreme Court has also found implied federal constitutional powers to regulated immigration as an incident of sovereignty, see, e.g. *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 711 (1893). The Supreme Court has repeatedly confirmed Congress's full and exclusive authority over immigration. *Kleindienst. v. Mandel*, 408 U.S. 753

(1972); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

There are three tests to determine whether federal law preempts a state or local statute relating to immigration. *LULAC v. Wilson*, 908 F.Supp. 755, 768 (C.D. Cal. 1995). The tests include whether the state is attempting to regulate immigration, whether Congress intended to occupy the field and oust state or local power, and whether the state law conflicts with federal law.

Federal courts have consistently found unconstitutional state laws which attempt to regulate immigration. See Chy *Lung v. Freeman*, 92 U.S. 275, 280 (1876)(holding state statute unconstitutional where state commissioner in California could classify arriving immigrants finding that such law interfered with Congress's right to regulate foreign nationals); *LULAC v. Wilson*, 908 F. Supp. 755, 769-71 (C.D. Cal. 1995)(holding California's Proposition 187 unconstitutional where it required state and local agencies to verify immigration status of persons with whom they came in contact, notify certain individuals of their immigration status, and deny those individuals with health care, social services, and education. The *LULAC* court found that the "verification, modification, and cooperation/reporting requirements of Proposition 187 "directly regulated immigration" by "creating a comprehensive scheme to detect and report the presence and effect the removal" of undocumented immigrants. *Id* at 769.

Congress enacted a comprehensive federal system more than two decades ago to govern employment verification and to prohibit hiring unauthorized aliens. The Immigration Reform and Control Act of 1986 ("IRCA") amended the Immigration and Nationality Act ("INA") to establish a complex and comprehensive federal system for regulating the employment of aliens. 8 U.S.C. §§1324a-1324b; see also 8 C.F.R. Section 274a.1-14. IRCA makes it unlawful to knowingly hire an unauthorized alien, establishes an employment verification system (the "I-9 process"), and makes an employer's good faith compliance a defense to liability. 8 U.S.C. §§1324a(a)(1)(A), 1324a(b)(1), 1324a(a)(3), (b)(6) and 8 C.F. R. §274a.2(a)(2)(3).

Significantly, IRCA established a detailed hearing and adjudication process for alleged violations against an employer, which requires notice, an opportunity for an evidentiary hearing before a federal administrative law judge, a finding that a knowing violation has occurred, administrative appeal rights, and the right for review in the federal Courts of Appeals. 8 U.S.C. §1324a(e)(2)-(3), (7)-(8). IRCA also included a detailed graduated system of penalty sanctions and detailed anti-discrimination provisions. 8 U.S.C. §1324a(e)(4), (f) and 1324b.

Lastly, Congress later enacted a voluntary and experimental pilot program to allow employers to check a new hire's work authorization through the Internet. 8 U.S.C. §1324a note. Through this "E-Verify" system, employers "may elect" to

participate, and "may not be require[d]" to participate. IIRIRA, Section 402(a), 8 U.S.C. §1324a note.

Arizona enacted the Legal Arizona Workers Act which became operative on January 1, 2008. Ariz. Rev. Stat. §§23-212(D), 23-214. The Act imposes its own state defined sanctions on employers and mandates that all employers participate in the E-Verify system. Ariz. Rev. Stat. §§23-212(F)(1)(b), (c) and (d); 23-214. The Act also authorizes Arizona judges to determine whether an employee is authorized to work. Ariz. Rev. Stat. §23-212(H). The Act imposes state defined sanctions on employers found to be in violation, which per Governor Napolitano are "the most aggressive in the country" and akin to the "business death penalty". *Id.* Employers must report unauthorized alien workers to local authorities. *Id.*

Arizona's Act is preempted by federal law. First, Congress expressly preempted state or local laws to protect against broad employer and sanctions schemes, inconsistency in immigration laws, and to ensure uniform mechanisms to determine violations. Arizona's Act also conflicts with federal law by allowing the potential for state judges to determine authorization status and by mandating participation in the E-Verify program.

A. The District Court Erred When it Held that IRCA Authorizes Arizona's Act. IRCA Expressly Preempts State or Local Laws Which Impose Sanctions Against Employers

Congress has long made clear its intent that federal laws govern employment verification and the hiring of aliens in the United States. In 1986, the Immigration Reform and Control Act ("IRCA") reaffirmed Congress's intent by establishing a complex, carefully-balanced, comprehensive federal system for regulating the employment of aliens. 8 U.S.C. §§1324a-1324b; see also 8 C.F.R. §274a.1-14.

Pre-emption may be either express or implied and is compelled whether Congress' command is explicitly stated in the language or implicitly contained in its structure and purpose. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982). Congress' intent may also be inferred if the federal scheme is so pervasive and so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Id.

It also "makes no difference whether a state law is 'consistent' or 'inconsistent' with federal regulation... pre-emption occurs at least where state laws have a significant impact related to" Congress' objectives. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1974). Here, the Act is expressly pre-empted by IRCA, is inconsistent and significantly impacts federal law.

The district court analyzed IRCA's language in section 1324a(h)(2) which expressly preempts "any State or local law imposing civil or criminal sanctions"

"(other than through licensing and similar laws") on employers who hire unauthorized aliens. The district court erroneously concluded that IRCA expressly authorizes the Act as a "licensing" law. The Act's express wording and intent make clear that it is not a "licensing law", but an act which imposes civil sanctions against employers who hire unauthorized aliens. Employers are subject to probation, suspension and permanent termination of their business licenses all with the clear intent of penalizing and sanctioning an employer's alleged knowing or intentional hiring of unauthorized workers. The Act is not about the "issuance" of a license, but instead about sanctions for alleged conduct. IRCA preempts the Act.

B. The District Court Erred By Holding the Act Does Not Conflict with IRCA. The Act Conflicts With Federal Law.

The district court also erred in finding that the Act does not conflict with IRCA. The Act allows state judges to determine worker authorization status contrary to federal law, and the Act compels participation in the voluntary E-Verify program. Both provisions of the Act contradict federal law.

IRCA governs the employment of aliens in the United States, and specifically states that it "preempt[s] any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws).

Congress did not intend to leave employer sanctions open for States, like Arizona, to attempt to promote their own sanctions standards by direct legislation. "Confusion would necessarily result from control possessed and exercised by two

independent authorities", *Easton v. Iowa*, 188 U.S. 220, 231-232 (1903). See also *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1568 (2006)(holding the National Bank Act was created "recognizing the burdens and undue duplication state controls could produce").

Nor did Congress intend that the State may determine the status of an unauthorized alien contrary to federal law. Yet the Act allows state court judges to make such a determination upon consideration of date received under 8 U.S.C. § 1373(c). Ariz.Rev.Stat. § 23-212(A), (D), (F), (H).

This raises a material conflict with federal law as to who may determine work authorization status which affects both the employer and the employee.

The Act also compels employers to use the E-Verify program to confirm worker authorization. IRCA makes participation in this program voluntary as Congress likely recognized that the program as a "pilot" program has the potential for significant errors. Arizona cannot be allowed to compel participation.

C. The Trial Court Erred in Finding that the Act Meets Due Process. The Act Subjects Employers and Employees to Inconsistent Rulings on Worker Status and Liability

The Act also violates due process. The Due Process Clause provides that the that the substantive rights of life, liberty and property cannot be deprived except by consistently adequate means. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 541 (1985). These rights include the right to earn a livelihood through

employment or business. *Id* at 1494 ("recognizing that while a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened.")

The Act interferes with the significant property and liberty interests of employers and employees. Employers may have their licenses suspended or permanently revoked, and their employees may lose their jobs. Yet the Act fails to give proper Notice of opportunity to be heard, and does not allow an appeal of the §1373(c) determination.

II. ARIZONA'S ACT THREATENS BUSINESS AND EMPLOYEE RIGHTS IN VIOLATION OF THE U.S. CONSITUTION

"Immigration is a federal concern," admits Governor Napolitano. This is consistent both with longstanding Congressional intent[2] and relevant case history which confirms that this nation "needs to speak with one voice" on immigration matters. See *Zadvydad v. Davis*, 533 U.S. 678, 700 (2001); *Graham v. Richardson*, 403 U.S. 365, 382 (1971). Indeed, through IRCA Congress emphasized the need for uniformity, consistent with the constitutional requirement of uniformity found in Article I, Section 8 of the United States Constitution.[3]

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[2] When Congress enacted IRCA, not only did it bind states from adopting similar legislation when it expressly preempted State and local laws on this issue, it also forbid the Executive branch from making major changes to IRCA without Congressional approval, and even minor changes required 60 days notice. 8 U.S.C. Section 1324a(d)(3). The intent is clear.

[3] See also Section 115 of IRCA which provides that immigration laws of this nation "should be enforced vigorously and uniformly. (emphasis added)

Enforcement of Arizona's Act threatens that uniformity. Other states and other localities have already introduced legislation similar to Arizona's Act to create their own immigration schemes designed to sanction employers. National corporations and companies that do business in multiple states are faced with complying with different rules, different procedures, and different schemes. Employers will be faced with multiple sanctions, threat of losing businesses and the potential for inconsistent rulings on the various issues involved.

Employees also face inconsistencies in law enforcement and violations of due process. The U.S. Supreme Court has made clear that "whatever may be the scope of the constitutional right of interstate travel, aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under nondiscriminatory laws." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948). The Act threatens this right. Employees' authorization status under the Act will be determined by state court judges separately from the federal IRCA process. Does that mean that an employee who works in multiple counties, even within Arizona, could be found "authorized" in one jurisdiction, but then "unauthorized" in another? And what of those who work seasonally in one state and then another?

Both employers and employees will be faced with inconsistencies which both our United States Constitution and Congress intended to avoid by mandating one uniform system under federal law.

CONCLUSION

For all of the reasons set forth above, as well as the arguments made by appellants in their opening brief, the district court's judgments should be reversed and an injunction should issue.

Dated: April 4, 2008

Respectfully submitted,

By: _____
MELINDA GUZMAN

CERTIFICATE OF COMPLIANCE

I certify that this amicus brief is proportionately spaced in Times New Roman font, 14 point type, and that this brief contains 3,507 words, exclusive of the corporate disclosure statement, table of contents, table of authorities, certificate of compliance and proof of service. This certification is based upon the Word count of the word processing system used in preparation of this brief.

Dated: April 4, 2008

By: Melinda Guzman
MELINDA GUZMAN

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And consolidated cases.

CERTIFICATE OF SERVICE

MELINDA GUZMAN
GOLDSBERRY, FREEMAN & GUZMAN, LLP
777 12th Street, Suite 250
Sacramento, California 95814
Telephone: (916) 448-0448
Facsimile: (916) 448-8628
(General Counsel for the United States Hispanic Chamber of Commerce)

DANIEL POCHODA
ACLU Foundation of Arizona
P.O. Box 17148
Phoenix, AZ 85011
Telephone: (602) 650-1854

STEPHEN P. BERZON
JONATHAN WEISSGLASS
REBECCA SMULLIN
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151

PAUL F. ECKSTEIN
JOEL W. NOMKIN
CHARLES A. BLANCHARD
Perkins Coie Brown & Bain P.A.
2901 North Central Avenue
Post Office Box 400
Phoenix, AZ 85001
Telephone: (602) 351-8000

BURT M. RUBLIN
DAVID A. SELDEN
JULIE A. PACE
DOUGLAS L. FLITTER
Ballard Spahr Andrews
& Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: (215) 665-8500

Attorneys for Plaintiffs/Appellees Arizona Employers for Immigration Reform, Inc., Chamber of Commerce of the United States, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona!, Inc., Arizona Landscape Contractors' Association, Arizona Contractors' Association.

DANIEL POCHODA
ACLU Foundation of Arizona
P.O. Box 17148
Phoenix, AZ 85011
Telephone: (602) 650-1854

LUCAS GUTTENTAG
JENNIFER C. CHANG
American Civil Liberties Union Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0770

OMAR C. JADWAT
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2620

STEPHEN P. BERZON
JONATHAN WEISSGLASS
REBECCA SMULLIN
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151

KRISTINA CAMPBELL
CYNTHIA VALENZUELA
Mexican American Legal Defense and Educational Fund
634 S. Spring Street, 11th Floor
Los Angeles, CA 90014
Telephone: (213) 629-2512 Ext. 136

LINTON JOAQUIN
MONICA T. GUIZAR
KAREN C. TUMLIN
National Immigration Law Center
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
Telephone: (213) 639-3900

Attorneys for Plaintiffs/Appellants
Valle del Sol, Inc., Chicanos Por La Causa, Inc., and Somos America

DAVID A. SELDEN
JULIE A. PACE
Ballard Spahr Andrews
& Ingersoll, LLP
3300 North Central Avenue, Suite 1800
Phoenix, AZ 85012
Telephone: (602) 798-5472

BURT M. RUBLIN
DOUGLAS L. FLITTER
Ballard Spahr Andrews
& Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: (215) 665-8500

OF COUNSEL:
ROBIN S. CONRAD
SHANE BRENNAN
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
Telephone: (202) 463-5337

Attorneys for Plaintiffs/Appellants
Arizona Contractors Association, Inc.,
and Chamber of Commerce of the United States of America, *et al.*

PAUL F. ECKSTEIN
JOEL W. NOMKIN
CHARLES A. BLANCHARD
Perkins Coie Brown & Bain P.A.
2901 North Central Avenue
Post Office Box 400
Phoenix, AZ 85001
Telephone: (602) 351-8000

Attorneys for Plaintiff/Appellant Wake Up Arizona! Inc.

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On April 1, 2008, I served the following document(s):

AMICUS CURIAE BRIEF OF THE UNITED STATES HISPANIC CHAMBER OF COMMERCE IN SUPPORT OF APPELLANTS.

I served the documents on the persons listed below, as follows:

Mary O'Grady - Solicitor General
Christopher A. Munns - Assistant Attorney General
Office of the Attorney General
1275 West Washington
Phoenix, AZ 850007-2926
Telephone: (602) 542-8986
Fax: (602) 542-8308
E-mail: Mary.Ogrady@azag.gov
Christopher.Munns@azag.gov

Roger William Hall
BUCKLEY KING
2020 N. Central Avenue, Suite 1120
Phoenix, AZ 85004
Telephone: (602) 424.2550
Fax: (602) 424.2566
Email: rhall@buckleyking.com

Michael Jay Lessler
COCONINO COUNTY ATTORNEY'S OFFICE
110 E Cherry St
Flagstaff, AZ 86001-4627
Telephone: (928) 779-6518
Fax: (928) 779-5618
Email: mlessler@coconino.az.gov

Georgia A. Staton
Eileen Dennis GilBride
JONES SKELTON & HOCHULI PLC
2901 North Central Ave, Ste 800
Phoenix, AZ 85012
Telephone: (602) 263-1700
Fax: (602) 200-7854
Email: gstaton@jshfirm.com
Email: egilbride@jshfirm.com

Daniel S. Jurkowitz
PIMA COUNTY ATTORNEY'S OFFICE
32 N Stone Ave, Ste 2100
Tucson, AZ 85701
Telephone: (520) 740-5750
Fax: (520) 740-5600
Email: Daniel.Jurkowitz@pcao.pima.gov

Chris Myrl Roll
PINAL COUNTY ATTORNEY'S OFFICE
PO Box 887
Florence, AZ 85232
Telephone: (520) 866-6271
Fax: (520) 866-6521
Email: Chris.Roll@co.pinal.az.us

William J. Kerekes
YUMA COUNTY ATTORNEY'S OFFICE
250 W 2nd St, Ste G
Yuma, AZ 85364
Telephone: (928) 817-4300
Fax: (928) 817-4321
Email: Bill.Kerekes@co.yuma.az.us

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Date: April 7, 2008

Sharla Maxey