

1 Stephen P. Berzon
Jonathan Weissglass
2 ALTSHULER BERZON LLP
177 Post Street, Suite 300
3 San Francisco, CA 94108
Telephone: (415) 421-7151
4 Facsimile: (415) 362-8064
Email: jweissglass@altshulerberzon.com

5 Kristina M. Campbell
6 (AZ Bar No. 023139)
Cynthia A. Valenzuela
7 MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL
8 FUND
634 S. Spring Street, 11th Floor
9 Los Angeles, CA 90014
Telephone: (213) 629-2512, x136
10 Facsimile: (213) 629-0266
Email: kcampbell@maldef.org

11 (Additional Counsel on Next Page)

Linton Joaquin
Marielena Hincapié
Monica T. Guizar
Karen C. Tumlin
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
Telephone: (213) 639-3900
Facsimile: (213) 639-3911
Email: tumlin@nilc.org

Daniel Pochoda (AZ Bar No. 021979)
ACLU FOUNDATION OF ARIZONA
P.O. Box 17148
Phoenix, AZ 85011-0148
Telephone: (602) 650-1854
Facsimile: (602) 650-1376
Email: dpochoda@acluaz.org

Attorneys for Plaintiffs

15 UNITED STATES DISTRICT COURT
16 FOR THE DISTRICT OF ARIZONA
17 PHOENIX DIVISION

18 CHICANOS POR LA CAUSA, INC.; and) Case No. _____
19 SOMOS AMERICA,)

20 Plaintiffs,)

21 vs.)

22 JANET NAPOLITANO, in her official)
capacity as Governor of the State of)
23 Arizona; TERRY GODDARD, in his)
official capacity as Attorney General of the)
24 State of Arizona; and GALE GARRIOTT,)
in his official capacity as the Director of)
the Arizona Department of Revenue,)

25 Defendants.)
26 _____)

COMPLAINT

1 Lucas Guttentag
Jennifer C. Chang
2 AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
3 Immigrants' Rights Project
39 Drumm Street
4 San Francisco, CA 94111
Telephone: (415) 343-0770
5 Facsimile: (415) 395-0950
E-mail: jchang@aclu.org
6

7 Omar C. Jadwat
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
8 Immigrants' Rights Project
125 Broad Street, 18th Floor
9 New York, NY 10004
Telephone: (212) 549-2620
10 Facsimile: (212)-549-2654
Email: ojadwat@aclu.org
11

12 Attorneys for Plaintiffs
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INTRODUCTION**

2 1. This lawsuit challenges Arizona’s attempt to enact laws regulating
3 immigration that intrude on the federal government’s plenary power and provide less
4 protection to workers and employers than federal laws.

5 2. The recently-enacted Legal Arizona Workers Act (the “Act”), establishes a
6 system unique to Arizona for sanctioning employers that employ aliens who are not
7 authorized to work. The Act also requires employers to verify the employment eligibility
8 of each employee through a federal verification program, even though federal law
9 establishes that participation in that program is voluntary. The Act is attached as Exhibit
10 A.

11 3. The Act violates the Supremacy Clause of the United States Constitution
12 because it is preempted by federal immigration law and the federal government’s
13 exclusive authority to regulate immigration. The Act also violates the Fourteenth
14 Amendment to the U.S. Constitution because it deprives employers and workers of liberty
15 and property without due process of law.

16 4. Were the Act’s provisions regarding employment of unauthorized aliens
17 and verification of employment eligibility to be upheld, it would be license for every state
18 and, indeed, every locality to enact its own immigration laws. The result would be
19 inconsistency and extreme confusion. This lawsuit seeks to avoid that result.

20 5. This lawsuit also seeks to prevent the inevitable harm to workers who are
21 authorized to work in the United States, particularly foreign-born workers and national
22 origin minorities, that the Act will cause if it is allowed to take effect. The Act will cause
23 authorized workers to not be hired, to be terminated, to have to undertake additional state-
24 created efforts to demonstrate that they are authorized to work, or to suffer other harms.
25 Finally, the suit seeks to prevent harm to employers who must comply with the Act.

26 **JURISDICTION AND VENUE**

27 6. This Court has jurisdiction under 28 U.S.C. §§1331 and 1343 because
28 Plaintiffs assert claims under the Constitution of the United States and 42 U.S.C. §1983.

1 employment eligibility of its employees. If the Act takes effect, CPLC will use the
2 voluntary Basic Pilot Program to verify employment eligibility both because the Act
3 requires employers to do so (Ariz. Rev. Stat. §23-214) and, separately, because doing so
4 provides a rebuttable presumption against liability for intentionally or knowingly
5 employing an unauthorized alien (Ariz. Rev. Stat. §23-212(I)). Using the Basic Pilot
6 Program would impose added costs and obligations on CPLC, including learning how to
7 use the Program; registering for the Program, which includes signing a Memorandum of
8 Understanding; and submitting to the Program for all new hires information such as
9 name, date of birth, and social security number.

10 9. Plaintiff Somos America is a community based coalition of grassroots
11 organizations, community and religious leaders, labor unions, and students established in
12 March 2006 to mobilize for social justice and equal rights for immigrant communities in
13 Arizona and for comprehensive immigration reform. Somos America seeks to challenge
14 injustice and the exploitation of workers and to promote civic participation, political
15 awareness, and education within the Latino community.

16 10. Defendant Janet Napolitano is sued in her official capacity as the Governor
17 of the State of Arizona. Governor Napolitano signed the Legal Arizona Workers Act,
18 House Bill 2779, into law on July 2, 2007. Pursuant to Article 5, Section 4, of the
19 Arizona Constitution, the Governor “shall take care that the laws be faithfully executed.”

20 11. Defendant Terry Goddard is sued in his official capacity as the Attorney
21 General of the State of Arizona. The Attorney General is Arizona’s chief legal officer.
22 Ariz. Rev. Stat. §41-192(A).

23 12. Defendant Gale Garriott is sued in his official capacity as the Director of
24 the Arizona Department of Revenue. Section 3 of the Act requires the Department of
25 Revenue to provide notice of the Act to every employer on or before October 1, 2007.

26 **GENERAL BACKGROUND**

27 13. Section 2 of the Legal Arizona Workers Act institutes sanctions against
28 employers that intentionally or knowingly employ an unauthorized alien and requires

1 employers to use the federal “Basic Pilot Program” to verify employment eligibility of
2 their employees.

3 **Prohibition on Intentionally or Knowingly Employing an Unauthorized Alien**

4 14. Section 23-212 prohibits employers from intentionally or knowingly
5 employing an unauthorized alien. Ariz. Rev. Stat. §23-212(A). An “unauthorized alien”
6 is defined as an alien who does not have the legal right to work in the United States under
7 federal law. Ariz. Rev. Stat. §23-211(8). An “employer” is defined as any individual or
8 organization that transacts business in Arizona, has a license issued by an Arizona
9 agency, and employs at least one person who performs employment services in Arizona.
10 Ariz. Rev. Stat. §23-211(4). A “license” is broadly defined to include “any agency
11 permit, certificate, approval, registration, charter or similar form of authorization that is
12 required by law” and that is issued by any state or local agency for the purposes of
13 operating a business in Arizona, and includes articles of incorporation and partnership
14 registrations. Ariz. Rev. Stat. §23-211(1), (7).

15 15. On receipt of a complaint that an employer is violating the prohibition on
16 employing an unauthorized alien, the Arizona Attorney General or county attorney must
17 investigate the complaint by verifying the work authorization of the alleged unauthorized
18 alien with the federal government, according to the federal inquiry procedure set forth in
19 8 U.S.C. §1373(c). Ariz. Rev. Stat. §23-212(B).

20 16. 8 U.S.C. §1373(c) provides: “The Immigration and Naturalization Service
21 shall respond to an inquiry by a Federal, State, or local government agency, seeking to
22 verify or ascertain the *citizenship or immigration status* of any individual within the
23 jurisdiction of the agency for any purpose authorized by law, by providing the requested
24 verification or status information.” (Emphasis added.)

25 17. Employment authorization status is distinct from citizenship or immigration
26 status under federal law.

27 18. If upon completion of the federal inquiry regarding citizenship or
28 immigration status the Arizona Attorney General or county attorney determines that the

1 complaint that an employer is employing an unauthorized alien was not frivolous, then he
2 or she must notify United States Immigration and Customs Enforcement and the local law
3 enforcement agency of the presence of the allegedly unauthorized alien. Ariz. Rev. Stat.
4 §23-212(C).

5 19. For all non-frivolous complaints, the Act requires that the county attorney
6 bring an action against an employer who intentionally or knowingly employs an
7 unauthorized alien in the county where the unauthorized alien is employed. Ariz. Rev.
8 Stat. §23-212(D). In determining whether an employee is unauthorized, the Superior
9 Court may *only* consider the federal government’s “determination” under 8 U.S.C.
10 §1373(c), even though that “determination” is deemed to create a “*rebuttable*
11 presumption of the employee’s lawful status.” Ariz. Rev. Stat. §23-212(H) (emphasis
12 added).

13 20. An employer that has verified its employee’s employment authorization
14 through a voluntary federal verification program known as the Basic Pilot Program is
15 entitled to a rebuttable presumption that the employer did not intentionally or knowingly
16 employ an unauthorized alien. Ariz. Rev. Stat. §23-212(H). The Basic Pilot Program –
17 recently renamed the “E-Verify” program – is a voluntary program the federal
18 government has offered employers.

19 21. The Act authorizes several state-created employer sanctions for an
20 employer found to have intentionally or knowingly employed unauthorized aliens under
21 the Act. First, the employer must terminate the employment of all unauthorized aliens
22 and file a sworn affidavit stating that it has done so and that it will not intentionally or
23 knowingly employ any unauthorized aliens. Ariz. Rev. Stat. §23-212(F)(1)(a), (1)(c),
24 (2)(a), (2)(d). Second, the employer is placed on probation for the first violation – for
25 three years for a knowing violation and five years for an intentional violation – during
26 which time the employer must file quarterly reports of each new employee it has hired at
27 the location where the unauthorized alien performed work. Ariz. Rev. Stat. §23-
28 212(F)(1)(b), (2)(b). Third, all of the employer’s licenses may be suspended for a

1 knowing violation; must be suspended for an intentional violation; and, upon a second
2 violation of any type during the probation period, must be permanently revoked. Ariz.
3 Rev. Stat. §23-212(F)(1)(d), (2)(c), (3). Finally, all court orders with respect to violations
4 will be posted on the Attorney General’s website to publicize employer violations. Ariz.
5 Rev. Stat. §23-212(G).

6 **Mandated Verification of Work Status Through the Basic Pilot Program**

7 22. The Legal Arizona Workers Act also requires employers, after hiring any
8 employee, to “verify the employment eligibility of the employee through the Basic Pilot
9 Program.” Ariz. Rev. Stat. §23-214.

10 23. The Basic Pilot Program, now known as “E-Verify,” refers to a *voluntary*
11 and *experimental* program established by Congress in the Illegal Immigration Reform and
12 Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208 (Sept. 30, 1996),
13 along with two other employment verification pilot programs which have since been
14 suspended. The Basic Pilot Program was extended only until November 2008 under the
15 Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156 (Dec. 3,
16 2003). 8 U.S.C. §1324a note. The Basic Pilot Program permits employers who choose to
17 participate to verify electronically workers’ employment eligibility. (Pursuant to statute, a
18 few employers that have violated federal employment verification laws may be required
19 to use the Program by the federal government.)

20 24. The Basic Pilot Program started in 1997 in only six states. The Program has
21 been available nationwide since December 2004. Employers who use the Program must
22 engage in various activities, including learning how to use the Program; registering for
23 the Program, which includes signing a Memorandum of Understanding (“MOU”) with the
24 Department of Homeland Security (“DHS”) and Social Security Administration (“SSA”);
25 installing software; and submitting to the Program for all new hires data such as employee
26 name, date of birth, and social security number.

27 25. The MOU imposes requirements on employers, including the following: all
28 employer representatives who use the Program must complete a tutorial; the employer

1 must become familiar with and comply with the manual for the Program (which is
2 lengthy); the employer must agree that in verifying employment eligibility of an employee
3 at the time of hire via the federal Form I-9 process, the employer will only accept
4 documents to establish identity that contain a photograph even though other employers
5 are not so limited under federal law pursuant to 8 C.F.R. §274a.2(b)(1)(v)(B); and the
6 employer must agree not to use the Program as a pre-employment screening procedure or
7 to engage in any unlawful employment practice. The MOU also provides that the federal
8 government may terminate access to the Program with 30 days' notice.

9 26. The Basic Pilot Program compares data submitted by employers via the
10 Internet to information in federal SSA and DHS databases. The system first uses the SSA
11 database to verify an employee's name, date of birth, and social security number. Upon
12 such verification, if the employee claimed U.S. citizenship and such citizenship is
13 confirmed by SSA's database, the Basic Pilot Program confirms employment eligibility.
14 For non-U.S. citizens, DHS checks whether the employee is authorized to work. If the
15 SSA database is unable to verify the employee information or DHS is unable to verify
16 employment authorization, the Basic Pilot Program issues a tentative nonconfirmation.
17 An employee may contest a tentative nonconfirmation by contacting the federal
18 government to resolve inaccuracies in the records. If an employee does not contest the
19 tentative nonconfirmation within eight federal working days, it becomes final and
20 employers must terminate the employee.

21 27. The Basic Pilot Program has encountered a number of problems with
22 accuracy and capacity since its inception. As the United States Citizenship and
23 Immigration Services found in its 2004 report mandated by Congress, the problems
24 include "unacceptably high" tentative nonconfirmation rates for foreign-born work-
25 authorized employees and "higher than desirable" rates for U.S.-born employees; lack of
26 employer compliance with the Program requirements, which reduces the Program's
27 effectiveness and contributes to discrimination against foreign-born employees; and
28 unattractiveness of the program to employers. In 2006, the SSA Inspector General found

1 that the SSA database contained enough discrepancies to result in an incorrect finding in
2 four percent of Basic Pilot Program submissions. Moreover, the records for supposedly
3 non-U.S. citizens showed seven percent were actually U.S. citizens who had not updated
4 their citizenship status. Currently, approximately 17,000 businesses nationwide use the
5 Basic Pilot Program. The Act will add 130,000-150,000 businesses to the Program, and
6 the State of Arizona believes that this “could strain the system.” Letter from Governor
7 Janet Napolitano to Speaker Nancy Peolosi and Majority Leader Harry Reid, July 2, 2007,
8 attached as Exhibit B.

9 **Effective Date and Harm**

10 28. Both the prohibition on intentionally or knowingly employing an
11 unauthorized alien and the verification requirement in Section 2 of the Act become
12 effective on January 1, 2008. Ariz. Rev. Stat. §§23-212(D), §23-214. Under Section 3 of
13 the Act, the Department of Revenue is to provide notice of Section 2 of the Act to every
14 employer on or before October 1, 2007.

15 29. The Act will have at least the following adverse effects: (a) cause workers
16 who are eligible for employment, particularly foreign-born workers and national origin
17 minorities, not to be hired in the first place, to lose their jobs, and to have to undertake
18 additional, state-created efforts to demonstrate that they are authorized to work; and (b)
19 impose additional costs and obligations on employers not required by federal law.

20 **FIRST CLAIM FOR RELIEF**

21 (Article VI, Section 2, of the United States Constitution; 42 U.S.C. §1983)

22 30. Plaintiffs re-allege and incorporate by reference ¶¶1 through 29.

23 31. Article VI, Section 2, of the United States Constitution, known as the
24 Supremacy Clause, provides: “This Constitution, and the Laws of the United States which
25 shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under
26 the Authority of the United States, shall be the supreme Law of the Land; and the Judges
27 in every State shall be bound thereby, any Thing in the Constitution or Laws of any State
28 to the Contrary notwithstanding.”

1 32. The Supremacy Clause mandates that federal law preempts any state
2 regulation of any area over which Congress has expressly or impliedly exercised
3 exclusive authority or which is constitutionally reserved to the federal government.

4 33. The power to regulate immigration is an exclusively federal power that is
5 inherent in the nation’s sovereignty and derives from the Constitution’s grant to the
6 federal government of the power to “establish a uniform Rule of Naturalization,” U.S.
7 Const. art. I, §8, cl. 4., and to “regulate Commerce with foreign Nations,” *id.*, cl. 3.

8 34. Pursuant to its exclusive power over matters of immigration, the federal
9 government has established a comprehensive system of laws, regulations, procedures, and
10 administrative agencies that determine, subject to judicial review, whether and under
11 what conditions a person may enter and live in the United States, including the
12 Immigration and Nationality Act (“INA”), 8 U.S.C. §1101, *et seq.* In 1986, for the first
13 time, Congress prohibited employers from knowingly hiring unauthorized aliens and
14 established a detailed employment verification process with sanctions for employing
15 unauthorized aliens. Immigration Reform and Control Act of 1986 (“IRCA”), 8 U.S.C.
16 §§1324a-1324b.

17 35. The INA as amended by IRCA sets forth a comprehensive employer
18 sanctions scheme that includes safeguards such as a “safe harbor” provision for
19 employers who are presented with facially valid documents; restrictions on reverification
20 of employees after they are hired; extensive antidiscrimination provisions; prohibitions on
21 employers requesting additional documents once an employee presents minimally
22 adequate documentation; a 10-day cure period for good-faith violations; and a graduated
23 series of penalties.

24 36. Before finding an employer in violation, federal immigration law requires
25 notice, an opportunity for a hearing with witnesses and evidence before a federal
26 administrative law judge, a finding that a violation has occurred based on a
27 preponderance of the evidence, a chance for an administrative appeal, and an opportunity
28

1 for review in the appropriate United States Court of Appeals. 8 U.S.C. §1324a(e)(2)-(3),
2 (7)-(8).

3 37. The comprehensive federal employer sanctions scheme does not require that
4 employers verify the immigration status of certain categories of workers, such as
5 independent contractors and casual domestic workers. 8 C.F.R. §274a.1(f), (h), (j).

6 38. Under the Supremacy Clause, the federal government has the authority to
7 enforce immigration statutes and regulations, confer benefits, make discretionary
8 determinations, undertake adjudication, and otherwise administer the federal immigration
9 laws.

10 39. The federal government retains and exercises the power to investigate
11 employment of unauthorized aliens at workplaces and has publicly raided workplaces
12 allegedly employing undocumented aliens.

13 40. The laws, procedures, and policies created by the federal government confer
14 rights in a careful balance reflecting the national interest. The Legal Arizona Workers
15 Act's prohibition on employers intentionally or knowingly employing an unauthorized
16 alien and requirement that employers verify employment eligibility threaten that balance
17 and are preempted.

18 41. IRCA provides for express preemption as follows: "The provisions of this
19 section preempt any State or local law imposing civil or criminal sanctions (other than
20 through licensing and similar laws) upon those who employ, or recruit or refer for a fee
21 for employment, unauthorized aliens." 8 U.S.C. §1324a(h)(2).

22 42. Under IRCA's preemption provision, licensing penalties are permitted *only*
23 when the federal government has found an employer to have violated IRCA.

24 43. The Legal Arizona Workers Act purports to allow licensing penalties for
25 employers that intentionally or knowingly employ an unauthorized alien even if the
26 federal government has not found those employers to have violated IRCA, and is
27 therefore expressly preempted.

28

1 44. The Act’s definition of “license” (Ariz. Rev. Stat. §23-211(7)) extends the
2 suspension or revocation sanction to many aspects of business that are not “licensing and
3 similar laws” as used by Congress in 8 U.S.C. §1324a(h)(2), and is therefore also
4 expressly preempted for this reason.

5 45. Moreover, the Act imposes additional sanctions on businesses beyond those
6 based on licenses, and is expressly preempted for this reason as well.

7 46. The Act’s institution of licensing penalties for employers that intentionally
8 or knowingly employ an unauthorized alien and the requirement that employers verify
9 employment are impliedly preempted because they:

10 a. Amount to an attempt to regulate immigration and its incidents.

11 b. Operate in a field occupied by the federal government through
12 Congress’ actions with respect to prohibiting the employment of unauthorized workers
13 and verifying employment eligibility.

14 c. Stand as an obstacle to federal law by posing a number of actual
15 obstacles to the objectives of Congress, including:

16 i. The Act will burden federal resources because the Arizona
17 Attorney General or county attorney must investigate *every complaint* about unauthorized
18 aliens through the federal inquiry system. Ariz. Rev. Stat. §23-212(B). Under IRCA,
19 only complaints “which, on their face, have a substantial probability of validity” or other
20 violations “as the [U.S.] Attorney General determines to be appropriate,” are investigated.
21 8 U.S.C. §1324a(e)(1).

22 ii. The Act’s unauthorized alien provisions disrupt and override
23 the carefully balanced system that Congress designed to guarantee due process, protect
24 employees against discrimination, and minimize disruption to businesses. 8 U.S.C.
25 §§1324a-1324b.

26 iii. The Act covers independent contractors and casual domestic
27 workers. Ariz. Rev. Stat. §23-211(3). Federal law does not. 8 C.F.R. §274a.1(f), (h), (j).

1 violation had occurred. 8 U.S.C. §1324a(e)(2), (3). An employer can appeal this order
2 administratively and seek judicial review in federal court. 8 U.S.C. §1324a(e)(7)-(8).

3 54. The investigation and court procedures contemplated by the Legal Arizona
4 Workers Act do not provide employers or employees with the opportunity to be heard
5 regarding the work status of an employee and the license of an employer in a meaningful
6 manner. An employee's work status is determined through a mere inquiry procedure to
7 the federal government about citizenship or immigration status, which is the only matter
8 an Arizona Superior Court may consider in deciding whether an employee is authorized
9 or not. Ariz. Rev. Stat. §23-212(H). The inquiry procedure under 8 U.S.C. §1373(c) does
10 not provide the protections set forth in the preceding paragraph or other protections
11 afforded by federal law.

12 55. The insufficient process afforded under the Legal Arizona Workers Act
13 means that employers who may not be found to have violated IRCA could be found liable
14 under the Act.

15 56. Any purported process provided by the Act relating to the determination of
16 immigration status is illusory because state courts lack the authority to determine such
17 status.

18 57. The Act's provisions on employing an unauthorized alien violate Due
19 Process Rights.

20 **PRAYER FOR RELIEF**

21 WHEREFORE, Plaintiffs pray for the following relief:

22 A. A temporary and permanent injunction enjoining Defendants, their officials,
23 agents, employees, assigns, and all persons acting in concert or participating with them
24 from implementing or enforcing Sections 2 and 3 of the Legal Arizona Workers Act;

25 B. A declaration pursuant to 28 U.S.C. §§2201 and 2202 that Sections 2 and 3
26 of the Legal Arizona Workers Act are unlawful and invalid;

27 C. Reasonable attorneys' fees and expenses pursuant to 42 U.S.C. §1988;

28 D. Costs of suit; and

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

E. Such other and further relief as this Court may deem equitable, just, and proper.

Dated: September 4, 2007

Stephen P. Berzon
Jonathan Weissglass
ALTSHULER BERZON LLP

Kristina M. Campbell
Cynthia A. Valenzuela
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND

Linton Joaquin
Marielena Hincapié
Monica T. Guizar
Karen C. Tumlin
NATIONAL IMMIGRATION LAW CENTER

Daniel Pochoda
ACLU FOUNDATION OF ARIZONA

Lucas Guttentag
Jennifer C. Chang
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION – Immigrants’ Rights Project

Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION – Immigrants’ Rights Project

By: /s/ Kristina M. Campbell
Kristina M. Campbell

Attorneys for Plaintiffs