No. 11-182

IN THE

Supreme Court of the United States

STATE OF ARIZONA AND JANICE K. BREWER, GOVERNOR OF THE STATE OF ARIZONA, IN HER OFFICIAL CAPACITY,
Petitioners,
v.
UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF MEMBERS OF CONGRESS AND THE COMMITTEE TO PROTECT AMERICA'S BORDER IN SUPPORT OF PETITIONERS

MICHAEL M. HETHMON
GARRETT ROE
IMMIGRATION REFORM
LAW INSTITUTE
[redacted]

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
LAURA B. HERNANDEZ
AMERICAN CENTER FOR
LAW & JUSTICE
[redacted]

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER MATERIALS

INTEREST OF AMICI*

Amici, United States Members of Congress Brian Bilbray, Trent Franks, Senator Jim DeMint, Senator David Vitter, Robert Aderholt, Michele Bachmann, Diane Black, Marsha Blackburn, Mo Brooks, Paul Broun, Michael Burgess, Dan Burton, Ken Calvert, John Culberson, John Duncan, John Fleming, Bill Flores, Randy Forbes, Virginia Foxx, Scott Garrett, Phil Gingrey, Paul Gosar, Ralph Hall, Lynn Jenkins, Walter Jones, Jim Jordan, Mike Kelly, Steve King, Adam Kinzinger, John Kline, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Blaine Luetkemeyer, Don Manzullo, Kenny Marchant, Tom McClintock, Jeff Miller, Tim Murphy, Sue Myrick, Alan Nunnelee, Joe Pitts, Ted Poe, Mike Pompeo, Ben Quayle, Phil Roe, Dana Rohrabacher, Dennis Ross, Ed Royce, Jean Schmidt, David Schweikert, Lamar Smith, Cliff Stearns, Lynn Westmoreland, Ed Whitfield, and Rob Woodall, are currently serving in the One Hundred Twelfth Congress.

Amicus, Committee to Protect America's Border,

---

* The parties have filed with the Court blanket consents to the filing of briefs amicus curiae in this case. No counsel for any party in this case authored this brief in whole or in part. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ and IRLI, their members, or their respective counsel made a monetary contribution to the preparation or submission of this brief. Neither the ACLJ nor the IRLI has a parent corporation, and no publicly held company owns 10% or more of either organization's stock.

consists of over 65,000 Americans nationwide.

Amici are committed to the constitutional principles of federalism and separation of powers, both of which are jeopardized by the Ninth Circuit's decision holding that Sections 2(B), 3, 5(C), and 6 of Arizona's immigration law, S.B. 1070, are preempted.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision should be reversed because it exalts Administrative "priorities and strategies" over Congress's clear and manifest intent to welcome state involvement in the enforcement of federal immigration law. It sets up an untenable conflict between Congressional immigration policy and Administrative "priorities" that the separation of powers doctrine requires the Administration to lose.

The Ninth Circuit's decision is also wrong because it muddies preemption analysis by analyzing S.B. 1070 as if it intruded into an arena that Congress intended to occupy exclusively. Although states may not pass laws setting immigration policy, they may pass harmonious laws that further Congress's purposes. Because S.B. 1070 is fully consonant with federal immigration laws, mirroring their standards and definitions, it is not preempted. The Ninth Circuit's decision to the contrary is based on conjured conflicts that have no basis in statutory language or

other Congressionally established immigration policy.

More egregiously, the Ninth Circuit's preemption analysis sets an extremely low threshold for implied preemption challenges, essentially establishing a rule that even the most minor discrepancy between state and federal law warrants a finding of preemption. That conclusion is insupportable in light of this Court's decisions in *Chamber of Commerce v. Whiting*, and *California v. Zook*.

Finally, the Ninth Circuit's implied preemption analysis tramples upon federalism by stripping the states of their plenary police power to enforce federal law in accordance with federal standards and to enact state law that does not conflict with federal law.

ARGUMENT

I. THE ADMINISTRATION'S PREEMPTION CLAIMS MUST BE EVALUATED IN LIGHT OF THE UNDERLYING TENSION THAT EXISTS BETWEEN FEDERAL LAW AND THE ADMINISTRATION'S ASSERTED POLICY OBJECTIVES.

This case highlights a significant conflict between the Executive and Legislative branches of the federal government over immigration policy. This lawsuit is the first of several that the current Administration filed against states seeking to stem the flow of illegal immigration across their borders. Though Arizona's

law mirrors federal immigration standards and promotes congressionally ordained policy, the Administration argues and the Ninth Circuit held that sections 2(B), 3, 5(C), and 6 of S.B. 1070 are impliedly preempted because, among other things, they interfere with the Administration's enforcement and foreign policy priorities. The underlying premise is that such Administrative "priorities" trump Congress's clear intent to permit states' authority to concurrently enforce federal immigration laws. This, however, is a conflict that the Executive must lose. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003) (noting that if the case had presented a conflict between federal law and presidential foreign policy objectives, *Youngstown* would control).

Youngstown established that where the Executive asserts a claim of authority (here, preemption authority) that is

> incompatible with the expressed or implied will of Congress, his power is at its *lowest ebb*, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive *must be scrutinized with caution, for what is at*

> *stake is the equilibrium established by our constitutional system.*

Youngstown, 343 U.S. at 637–38 (Jackson, J., concurring) (emphasis added) (footnote omitted); *see also Medellin v. Texas*, 552 U.S. 491, 524 (2008) (stating that Justice Jackson's concurrence in *Youngstown* sets forth the "accepted framework" for evaluating claims of presidential power).

The Administration's preemption claims are manifestly incompatible with the expressed will of Congress, and it is Congress that has plenary power over immigration. *INS v. Chadha*, 462 U.S. 919, 940 (1983).

II. THE NINTH CIRCUIT MISREAD CONGRESS'S INTENT AND SUBORDINATED THAT INTENT TO THE ADMINISTRATION'S ENFORCEMENT PRIORITIES.

A. Congress Has Plenary Power Over Immigration, but Has Manifested Clear Intent Not To Occupy the Field of Immigration Law.

Though Congress has plenary power over immigration, *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), it has not intended to occupy the field of immigration such that field preemption exists. To the contrary, Congress did not intend a "complete ouster of state

power" from the immigration arena, but has permitted "harmonious state regulation touching on" immigration. *De Canas v. Bica*, 424 U.S. 351, 357–58 (1976). *See also Plyler v. Doe,* 457 U.S. 202, 228 n.23 (1982) (states retain "power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns"). Thus, state laws cannot be preempted as long they: 1) are not expressly precluded by federal law, 2) do not create state-level standards regarding which aliens may enter or conditions upon which lawfully present aliens may remain in the United States, and 3) pose no obstacle to the accomplishment of Congress's goals, and it is possible to simultaneously comply with state and federal law. *De Canas*, 424 U.S. at 355–64.

B. Because Congress Did Not Intend To Occupy the Field of Immigration Enforcement, State Laws Like S.B. 1070 That Mirror Federal Provisions and Incorporate Federal Standards Are Not Impliedly Preempted.

In the absence of complete Congressional ouster of state law participation, concurrent enforcement of federal laws is permissible. State laws that mirror federal provisions and incorporate federal standards cannot, by definition, conflict with federal law.

Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1981 (2011). Rather, state penalties for conduct that violates federal requirements provides an additional incentive for compliance with the federal mandate and thus generally serve to advance rather than impair federal interests for purposes of implied preemption analysis. *California v. Zook*, 336 U.S. 725 (1949); *California v. ARC America Corp.*, 490 U.S. 93, 105 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

In *California v. Zook*, a California statute prohibited the sale of any transportation over the state highways if the carrier had no permit from the federal Interstate Commerce Commission. The law mirrored a federal provision banning the same activity. *Zook*, 336 U.S. at 726–27. Mr. Zook was convicted under the state law and argued that the federal provision preempted the identical state provision because "coincidence is as ineffective as opposition, and state laws aiding enforcement are invalid." *Id.* at 729 (internal quotation marks omitted).

Acknowledging that the federal law was enacted pursuant to Congress's expansive Commerce Clause power, the Court held nonetheless that Congress did not intend to occupy the field and that the state law was not preempted. *Id.* at 738. As in this case, there was no statutory language supporting the conclusion that Congress intended to occupy the field and thereby displace even identical state laws on the

subject. *Id.* at 732–33. Rather, the case "concern[ed] only the state's mechanism for enforcing a statute identical with that of the federal government, though rooted in different policy considerations," and the Court reasoned that the only Congressional purpose that would be furthered by preemption would be the "product of [the] Court's own imagination." *Id.* at 736–37. The Court noted additionally the strained resources of the Interstate Commerce Commission and observed: "It is difficult to believe that the I.C.C. intended to deprive itself of effective aid from local officers experienced in the kind of enforcement necessary to combat this evil." *Id.* at 737.

In *Whiting*, this Court reinforced the *Zook* principle that in the absence of Congressional intent to oust state law or explicit preemption language, state provisions mirroring federal standards do not impair federal objectives. Where "Congress specifically preserved [enforcement] authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *Whiting*, 131 S. Ct. at 1981. Because Arizona had incorporated federal standards into its law revoking the licenses of businesses that knowingly hire illegal aliens, the Court held that "there can by definition be no conflict between state and federal law." *Id.*

Whiting also established that where Congress leaves a role for the states in immigration enforcement, preemption cases involving uniquely federal areas of regulation are inapposite. The very cases the Ninth Circuit relied on, such as *Am. Ins.*

Ass'n v. Garamendi, 539 U.S. 396 (2003), *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), and *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), were distinguishable because those cases involved "uniquely federal" areas of federal regulation. *Whiting*, 131 S. Ct. at 1983. Moreover, the state laws at issue in those cases "directly interfered with the operation of the federal program." *Id.* As was true in *Zook*, the state licensing law in *Whiting* did not interfere with operation of a federal program. To the contrary, the Arizona licensing law fostered federal policy and the federal laws operated "unimpeded by the state law." *Id.*

Similarly, S.B. 1070 impedes no federal law precisely because Congress (i) left the states' enforcement authority undisturbed, (ii) encouraged cooperative communication and law enforcement between state and federal officials, (iii) explicitly prevented any law that would limit a state's ability to identify and report an illegal aliens presence in this country, and (iv) because S.B. 1070 incorporates all key federal definitions and standards.

C. The Ninth Circuit's Decision Conflicts With The Preemption Principle That High Threshold Must Be Met To Find a State Law Preempted for Conflicting with Congress's Purposes.

The Ninth Circuit's implied preemption analysis exemplified the "freewheeling judicial inquiry" proscribed in *Whiting*. *Whiting*, 131 S. Ct. at 1985. Untethered as it was from controlling statutory text,

the Ninth Circuit's fanciful determination that sections 2B, 3, 5C, and 6 of S.B. 1070 are "in tension with federal objectives" "undercut[s] the principle that it is Congress rather than the courts that preempts state law." *Id.* As Justice Kennedy observed:

> Any conflict must be "irreconcilable . . . . The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982); see also *English*, 496 U.S. at 90 ("The 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists'" (quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960)); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 222–223 (1983).

Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring). The conflict between federal law and S.B. 1070 is nonexistent.

D. S.B. 1070's Provisions Are Consistent with Federal Immigration Policy Promoting Increasingly Greater Roles for States in Enforcing Immigration Law.

1. Section 2(B) Fosters Sharing of Immigration Status Information Between All Levels of Government.

Congress's intent is the "touchstone" of any preemption case, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), and S.B. 1070, § 2(B) furthers Congress's intent that States play a significant role in enforcing federal immigration law. Before S.B. 1070 was signed into law, state and local officers had the discretion during a lawful stop, detention, or arrest, to contact the federal government and verify that person's immigration status, if the officer had reasonable suspicion of unlawful status. *See, e.g.*, *United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001) ("[S]tate law enforcement officers within the Tenth Circuit 'have the general authority to investigate and make arrests for violations of federal immigration laws . . . .'"); *Estrada v. Rhode Island*, 594 F.3d 56, 63–64 (1st Cir. 2010); *United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007); *United States v. Rodriguez-Arreola*, 270 F.3d 611, 618–19 (8th Cir. 2001); *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987); *United States v. Contreras-Diaz*, 575 F.2d 740, 743–45 (9th Cir. 1978); *United States v. Alvarado-Martinez*, 255 Fed. Appx. 646 (3d Cir. 2007). Thus,

section 2(B) modified prior police practice in Arizona only to the extent that officers now *must* do what they were always *authorized to do* under pre-existing law.

Congress was aware of this pre-existing state authority when it passed the Illegal Immigration and Immigrant Responsibility Act ("IIRIRA"), and the Senate Report expressly encouraged State assistance:

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the *achieving of the purposes and objectives of the Immigration and Nationality Act*.

S. Rep. No. 104-249, at 19–20 (1996) (emphasis added). *See also United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999); In re *Jose C.*, 45 Cal. 4th 534, 552 (2009).

As part of IIRIRA, Congress passed two laws manifesting its intent that States exercise this pre-existing authority. First, Congress mandated that federal immigration officials respond to all immigration inquiries by state and local officers. 8 U.S.C. § 1373(c) (2006). "The [ICE Agency] *shall* respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the

citizenship or immigration status of any individual . . . by providing the requested verification or status information." *Id.* (emphasis added); *see also Whiting*, 131 S. Ct. at 1982. Congress's use of the term "shall" means that the agency's response is mandatory. *United States v. Monsanto*, 491 U.S. 600, 607 (1989). Congress anticipated inquiries like those described in S.B. 1070 § 2(B) and deprived DHS of discretion to ignore them. In fact, funds have been consistently appropriated to operate a specialized federal sub-agency, the Law Enforcement Support Center ("LESC"), to efficiently handle these kinds of inquiries.[1]

When Congress exercises plenary power to prescribe laws, the Executive must follow Congress's direction. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 696—99 (2001) (holding the Attorney General had no power to detain aliens indefinitely because that power conflicted with 8 U.S.C. § 1231(a)(6) (2006)); *Jama v. ICE*, 543 U.S. 335, 368 (2005) (Souter, J., dissenting) ("Congress itself . . . significantly limited Executive discretion by establishing a detailed scheme that the Executive must follow in removing aliens."). In other words, when Congress tells an agency to act, the agency must comply. The agency cannot refuse to obey statutory commands to pursue

---

[1] Congress intended the LESC's primary users to be "state and local law enforcement officers seeking information about aliens encountered in the course of their daily enforcement activities." U.S. Immigration and Customs Enforcement, Investigations, Fact Sheet: Law Enforcement Support Center, http://www.ice.gov/news/library/factsheets/lesc.htm (last visited February 9, 2012).

its own priorities. *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007).

The only preemptive intent expressed in section 1373 is in subsections (a) and (b). Both of these subsections prohibit federal, state, and local government entities and officials from *restricting* the sharing of immigration status information.

Second, Congress further codified its intent to welcome state involvement in immigration law enforcement in 8 U.S.C. § 1357(g)(10) (2006). In 8 U.S.C. § 1357(g)(1), Congress created a new program that gave participating state and local governments additional authority in immigration enforcement. Anticipating arguments that participation in this new program might be construed as a prerequisite for a state or local officer to share status information or assist in immigration law enforcement, Congress included the broad language of 8 U.S.C. § 1357(g)(10). Under section 1357(g)(10), Congress declared that no agreement would be necessary for States to communicate with the Attorney General regarding immigration status or to otherwise cooperate in identifying, apprehending, detaining, and removing unlawful aliens.

The Ninth Circuit ignored congressional intent to foster state and local support in immigration law enforcement and held, despite express language to the contrary, that Congress envisioned state involvement only after the federal government has asked the state for help. *See United States v. Arizona*, 641 F.3d 339, 349 (9th Cir. 2011). The Ninth Circuit wrongly held that the distinct program authorized by 8 U.S.C. § 1357(g)(1)—(9) swallowed

the contemporaneous preservation of inherent state enforcement authority in sections 1357(g)(10) and 1373. *Id.* The Ninth Circuit focused almost exclusively on the inclusion of the word "removal" in 8 U.S.C. § 1357(g)(10)(B) and reasoned that Congress did not intend to grant states the authority to remove immigrants. *Id.* This is simply a *non sequitur*. Nothing in section 2 confers authority to remove an alien or threatens the federal government's exclusive jurisdiction over the subject.

The Ninth Circuit offered no explanation for its conclusion that Congress's "clear and manifest" purpose was to preempt state laws requiring officers to systematically verify immigration status violations. The court's interpretation of § 1357(g) imputes irrationality to Congress in violation of the statutory construction principle that absurd interpretations are to be avoided. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Congressional intent is clear: local cooperation is encouraged. Arizona has done exactly what Congress hoped states would do—assist the federal government in immigration enforcement. Arizona just did it on a uniform statewide basis.

The Ninth Circuit's determination that section 2(B) is preempted is irreconcilable with *Whiting*'s negative view of an implied preemption claim against a state immigration law that incorporated federal standards. In fact, the Administration's implied preemption theory is even weaker because the purported conflict is with uncodified Administrative agency "priorities." Federal agency regulation can preempt state law only when the agency is acting

within the scope of its congressionally-delegated authority, that is, when the agency is furthering Congress's intent. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). As for the scope of the agency's delegated authority, a court may not "simply . . . accept an argument that the [agency] may . . . take action which it thinks will best effectuate a federal policy" because "[a]n agency may not confer power upon itself." *Id.* at 374.

There is accordingly a strong presumption against implied administrative agency preemption, especially when, as is the case with ICE, the agency has no formal regulations expressly preempting state laws:

> [A]gencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Hillsborough Cnty v. Automated Med. Lab., Inc., 471 U.S. 707, 717 (1985). "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *La. Pub. Serv. Comm'n,* 476 U.S. at 374–75.

In holding that the Administration's "priorities and strategies" preempted section 2(B), the Ninth Circuit effectively overrode Congress and, in the process, undermined the separation of powers. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 637–38 (Jackson, J., concurring).

2. Section 3 Promotes Federal Law Requiring Aliens to Register and Carry Registration Documents on Their Persons.

Section 3 promotes Congress's requirement that aliens register with the federal government and carry their registration document "at all times." 8 U.S.C. §§ 1304(e), 1306(a).

This Court has long upheld the concurrent parallel enforcement authority of the States. *See Barkus v. Illinois*, 359 U.S. 121, 131—32 (1959); *Moore v. Illinois*, 55 U.S. 13 (1852); *see also Zook*, 336 U.S. at 737; *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Moreover, federal courts traditionally presume that the federal government wants help from the states. *See Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928) ("[I]t would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the states may allow."); *see also Zook*, 336 U.S. at 737. State officers have the authority to arrest aliens for violations of the alien registration acts. *See, e.g.*, *Salinas-Calderon*, 728 F.2d 1298, 1301 (12th Cir. 1984); *Estrada*, 594 F.3d at 65. Because State police already have the authority to enforce the federal

criminal misdemeanors, preemption of Section 3 based on the inclusion of state sanctions alone is wrong. *Zook*, 336 U.S. at 737.

The Ninth Circuit could find no express preemptive intent in the federal alien registration laws but instead revived a preemption-through-silence theory, opining that, because Congress did not ask States for help, intent to preempt must be implied. *See Arizona*, 641 F.3d at 355. The Ninth Circuit further constructed its Section 3 analysis on a misreading of *Hines v. Davidowitz*, 312 U.S. 52 (1941). The Ninth Circuit found section 3 to be within the "broad description" of state action proscribed in *Hines*, which invalidated a Pennsylvania alien registration law. *Arizona*, 641 F.3d at 356—57. The Ninth Circuit seemed to misinterpret *Hines* as a field preemption case citing the "complete scheme" of the alien registration laws, *id.* at 355—56, even though *Hines* "expressly le[ft] open" whether "the federal power in this field [of alien registration] . . . is exclusive." 312 U.S. at 62.

Correctly understood as an as-applied conflict preemption case, *Hines* held that the Pennsylvania law conflicted with Congress's purposes because it required aliens to register with the state under a separate, state-specific alien registration system, and because, unlike the 1940 federal law, it required aliens to carry their registration documents. *Id.* at 67, 72, 74.

By contrast, there is no discrepancy between the requirements of section 3 and the federal law. Section 3 makes failure to comply with the federal laws a state crime, carefully "trac[ing]" both the

federal language and penalties, and the national registration system operates "unimpeded." *See Whiting*, 131 S. Ct. at 1982, 1983.

Even if *Hines* were not distinguishable from this case, its continuing vitality is questionable after *Whiting*'s emphasis on "the high threshold that must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." 131 S. Ct. at 1985.[2]

3. Section 5(c) Is Not Preempted Because It Promotes Congress's Goal of Protecting American Jobs.

Because it concerns the employment of illegal aliens, section 5(c) is entitled to the presumption against preemption. *De Canas v. Bica*, 424 U.S. at 356 ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."). Section 5(c) promotes Congress's objectives of "'preserv[ing] jobs for American workers,'" *INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 194 (1991) *(*quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984)), and "ending the magnet" of jobs that lure illegal aliens, H.R. Rep. No. 99-682(I), at 45—46. Although the Ninth Circuit gave lip service to this presumption, it resorted again to the

---

[2] Although only four Justices joined this section of the *Whiting* opinion, Justice Thomas had previously expressed his view that "purposes and objectives" conflict preemption threatened federalism. *See Wyeth v. Levine*, 555 U.S. 555, 583—585 (2009) (Thomas, J., concurring).

preemption-through-silence theory and held that section 5(C) is preempted because it purportedly conflicts with Congress's intent to sanction only employers of unauthorized workers, and not the aliens themselves.[3]

That Congress believed punishing employers rather than employees was a more effective use of federal resources in deterring illegal immigration does not evince a "clear and manifest" intent to preempt Arizona's authority to punish employees. The only preemptive language found in the federal Act, 8 U.S.C. § 1324a deals with the ban against state criminal and civil sanctions against employers. 8 U.S.C. § 1324a(h)(2). Thus, Congress chose only to preempt states from imposing certain sanctions against employers. Congress did not proscribe states from sanctioning employees and Arizona's police power to do so has accordingly not been displaced. *De Canas*, 424 U.S. at 356. Section 5(c) is entirely

---

[3]The court relied on upon an earlier circuit case, *Nat'l Ctr. for Immigrants' Rights, Inc. v. I.N.S.*, 913 F.2d 1350 (9th Cir. 1990), which this Court reversed in *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.,* 502 U.S. 183 (1991). Contrary to the Ninth Circuit's characterization, *see* 742 F.3d at 357, the *NCIR* decision was not "reversed on other grounds." Rather, the challenged INS regulation in *NICR*, which barred unauthorized aliens from working while on bond, was held consistent with Congress's intent that immigration law protect American jobs. 502 U.S. at 194. Thus, this Court necessarily rejected the Ninth Circuit's holding in *NICR* that Congress's purpose was limited narrowly to sanctioning employers who hired illegal aliens. 913 F.2d at 1369.

compatible with the INA's goal of protecting jobs for American workers.

4. Section 6 Fosters Cooperative Enforcement of the Immigration Law.

Section 6, like Section 2(B), furthers Congress's purpose to promote cooperative efforts in the enforcement of immigration law, and furthers Congress's objective that state and local officers use their inherent arrest authority to assist in the detention of unlawful aliens. *See* 8 U.S.C. § 1357(g)(10)(B).

The Ninth Circuit reasoned that Section 6 was preempted because another federal statute, 8 U.S.C. § 1252c, limited state and local officers' authority in arresting illegal aliens. *See Arizona*, 641 F.3d at 363—65. The Ninth Circuit is wrong. As the Tenth Circuit correctly held, states have the inherent authority to arrest individuals for immigration violations. *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999); *Salinas-Calderon*, 728 F.2d at 1301 n.3 (validating a warrantless arrest for a violation of immigration law and noting that officers have "general investigatory authority to inquire into possible immigration violations").

In *Vasquez-Alvarez,* the Tenth Circuit correctly understood that 8 U.S.C. § 1252c was drafted to displace unidentified perceived federal limitations on state arrest authority, not to pre-empt any pre-existing state arrest authority. *Id.* at 1300. A federal statute designed to displace perceived federal limitations on State authority cannot possibly be

construed to evidence Congress's "clear and manifest" purpose to limit state authority.

III. FEDERALISM PRINCIPLES SHOULD BE PARAMOUNT IN ANALYZING AN IMPLIED PREEMPTION CHALLENGE TO STATE LAWS THAT DO NO MORE THAN ENFORCE FEDERAL IMMIGRATION STANDARDS.

The Ninth Circuit's decision treads upon federalism by stripping the states of their Congressionally ordained power to deter illegal immigration in accordance with federal standards. This Court recognized in *Plyler v. Doe* that "unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service." 457 U.S. at 228 n.23. In the realm of illegal immigration control, preempting state laws that mirror federal standards but provide slightly different enforcement mechanisms eviscerates the states' ability to "make choices that are responsive to their residents' desires, to experiment, and to advance liberty and freedom within their boundaries." Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 Brook. L. Rev. 1313, 1326 (2004) ("[A] broad vision of inferred preemption invalidates beneficial state laws."). *See also* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685, 697 (1991);

Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. Chi. Legal F. 57, 80 (2007).

The Constitution is structured so that "[s]tates possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin*, 493 U.S. at 458.

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (citing Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987) (other citations omitted)). The Founders established the federalist system so that states could "respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *United States v. Bond*, 131 S. Ct. 2355, 2364 (2011).

Although the Supremacy Clause, U.S. Const. art. VI, cl. 2, confers "a decided advantage" to the federal

government, the power to preempt state laws is "*an extraordinary power* . . . [that the Court] *assume[s] Congress does not exercise lightly*." *Gregory*, 501 U.S. at 460 (emphasis added). And, when the preemption claimed is one of implied conflict, "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal act." *Whiting*, 131 S. Ct. at 1055 (quotations omitted). Thus, "the true test of federalist principle[s]" comes in preemption cases. *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).

The states bear the overwhelming brunt of the social and economic costs resulting from unchecked illegal immigration. Although most tax revenues generated by illegal immigrants flow to the federal government, almost all the costs, including those borne by locally funded social services and those caused by illegal immigrant crime, accrue to the states. Schuck, *Taking Immigration Federalism Seriously*, *supra*, at 80. Of the net national illegal immigration cost of almost $100 billion, the federal government bears only $19.3 billion while state and local governments bear a net loss of $79.2 billion spent in services and benefits provided to illegal aliens. Jack Martin & Eric A. Ruark, Fed'n for Am. Immigration Reform, *The Fiscal Burden of Illegal Immigration on United States Taxpayers* 79 (July 2010) [hereinafter *FAIR: The Fiscal Burden of Illegal Immigration*], *available at* http://www.fairus.org/site/DocServer/USCostStudy_2010.pdf?docID=4921.

Federalism and comity recoil at the notion that the states are divested of power to enforce federal law and to provide state remedies that are

"consistent with pertinent federal laws." *De Canas*, 424 U.S. at 357. S.B. 1070 mirrors federal immigration provisions and in no way interferes with any federal objective.

CONCLUSION

Amici respectfully request this Court to reverse the Ninth Circuit.

Respectfully submitted,

MICHAEL M. HETHMON
GARRETT ROE
IMMIGRATION REFORM
LAW INSTITUTE
[redacted]

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
LAURA B. HERNANDEZ
AMERICAN CENTER FOR
LAW & JUSTICE
[redacted]